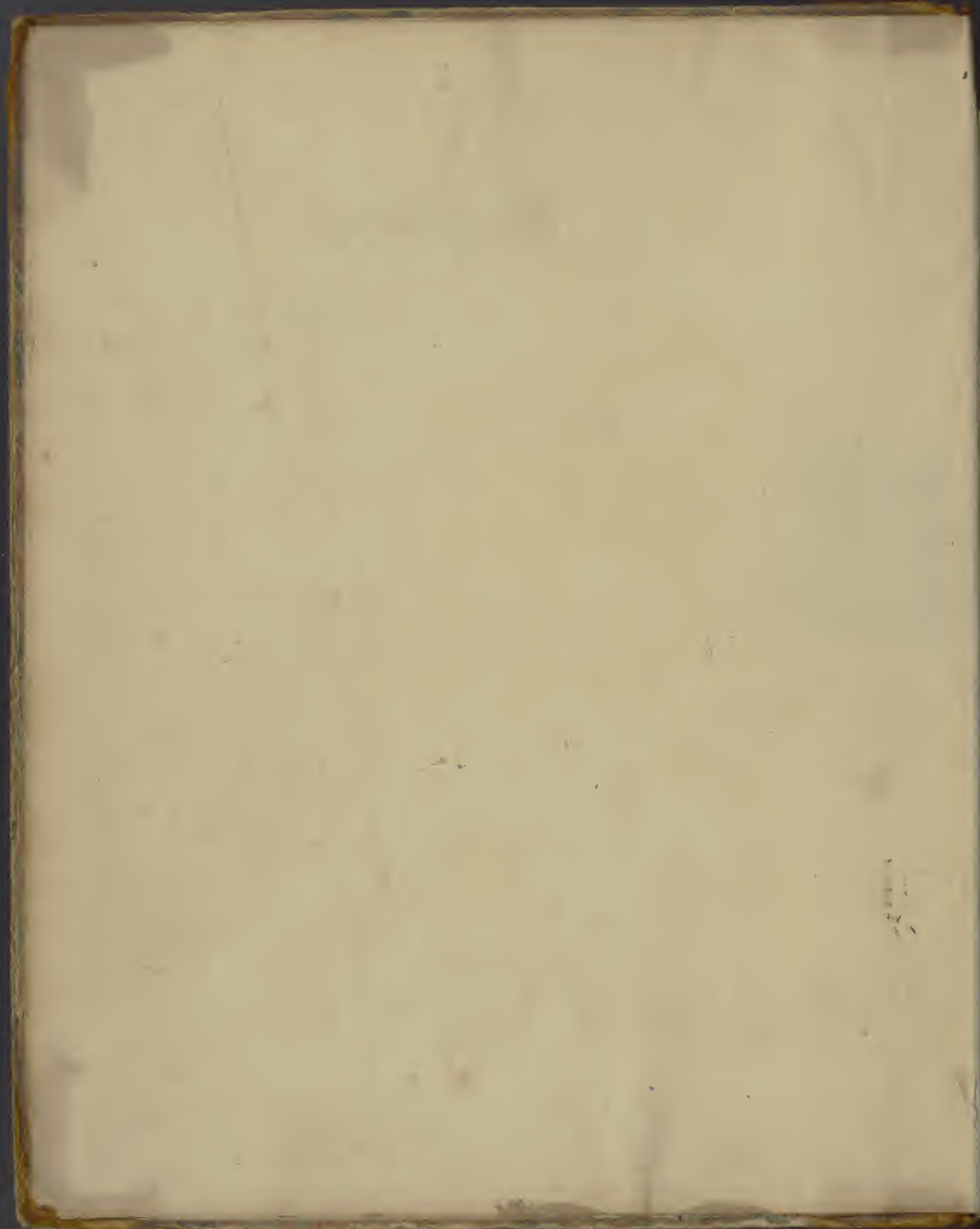


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Boston



Lectures

on

Real Property

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Delivered at their Law Institution

ⁱⁿ
Litchfield

Connecticut

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Real Property

General observations by the Honorable T. Bouverie

I have never seen any definition of real property which is perfectly accurate.

It is sometimes said to be immovable in distinction from personal property. But an estate for years is personal property. The definition is not therefore correct.

So real property is said to be such as descends to a man's heir. But an estate for life is real property, and does not descend. The other real property is descendible.

His heirs descend to the heir but still they are personal property. This definition is not therefore correct.

That property which is real in lands is either a fee simple a leasehold or an estate for life.

For land is meant not only the earth but the water and buildings and every thing that grows on the land. It extends sometimes in quantum in celo. And by a grant of land the growing crop passes unless excepted it be joint.

Incorporeal property may be real. When so it consists of some right springing out of a corporeal hereditament. As a right of way, or a right of fishery, which may be owned by a man who is not the owner of the land.

And these incorporeal hereditaments may be for life or inheritance, and they may be created expressly or in a creation of law. There is one kind which belongs to the Crown only, & yet is real property. I mean annuities, and these descend to the heir.

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In real estates there are various interests as estates in fee tail, in fee simple & for life. These are real property.

But besides these there are other estates in lands which are merely personal property. As estates at will for years or by sufferance.

In Europe the first estates were merely estates at will. The tenants then became anxious to have a more permanent interest. The barons then granted estates for years. After this they granted estates for life. Now there was then no idea of land being descendible. And hence the maxim that an estate to A is only an estate for life.

Now they introduced the word heir, & this was to shew that the estate was to descend. But the idea then was that no one should inherit unless he was of the blood of the first purchaser. And this is still a maxim in the law.

But then they introduced a fiction where the grantor had no children viz. that the land descended from a former ancestor. So that the maxim is still preserved and collateral relations set in as heirs. Thus estates became descendible generally. But still there was no such thing as conveying away the estate.

But finally it became desirable for the owner to dispose of the estates & this was finally allowed. Thus estates given in this way, were finally like our estates in fee. The word heir now, only designated the quantity of the estate.

But finally the barons desiring to restrain these conveyances, conveyed them, with words of limitation.

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tion as to the man or the heirs of his body. But then the judges held these to be grants of fee simple conditional i.e. that the estate should be a fee simple if the man had heirs of his body.

But at length the Barons obtained the statute as done which directed that the estate should go as limited and incumptions. But the evils introduced by this statute were finally remedied by a fiction by which the estate was doctored. This is effected either by fine or common recovery.

The word heir therefore is not now descriptive of persons but merely denotes the quantity of estate. And no estate ^{in fee} can be created without this word however clear the intention may appear. But in a will it is otherwise; the rule there is that the intention is to prevail only where it is consistent with the rules of law.

The restriction to the rule is merely meant to re-^{that the intention is to prevail in the construction of a will}strain the creation of such estates as are known to the law and not to the words by which they are created. As if an estate be given in fee with a provision that it shall not be conveyed. This would not be good if in a will for the law knows no such estate. So a conveyance of personal property by a will is not good however clear the intention is.

There has arisen a great dispute. The rule in Shelley's case is that if an estate is given to a man for life and no longer and then to his heirs that the first taker has an estate in fee simple. It is held by one class of judges, and by another class perhaps equally respectable, that that is not an estate for life.

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The former class contend that the particular here must be named in order to make it an estate tail. But if it is apparent that the word heir means some particular person, then we agree that this is a limited estate, as if it be given to A for life, remainder to his heir who is now living, & he has an only son. For my own part I do not see why, where the word heir is used in its technical sense & there are words which clearly denote the intention of the testator that the first should take only for life, - should not be considered an estate tail.

Suppose an estate is given to A for the life of B. B dies during the life of A. Now A's heir cannot take it for there are no words of inheritance nor can it go to the executor for it is real property. Still in the Common Law this estate was given to the first heir.

Now in C there is a statute considering this particular property. And we adopt the reason at that statute.

Conveyances are sometimes real and sometimes personal property. They pass by a deed of the land, and here they are real. So it is merely trespass to take them and here because they are considered real property. But if a man dies before the crop comes, the executor takes it, where it is, because personal property. Real property is acquired by purchase or descent. Every method of acquiring real property except by descent is by purchase. So if it comes by will or attachment, &c.

There is a reason in law that an estate of freehold cannot be given to commence in grant. But this may be done by a will where it will not create a perpetuity. And in fact one may by his will give an estate to the issue of any person, natural or legal. But you can go no farther. There is however no reason in the will of common law it is merely a maxim.

The statute of Henry 8th did give a right to dispose of real property by will.

Real Property

Lecture 1
James Gould Esq.
May 12th 1818.

Things as that word is used in the Law, are the subjects of property, or the subjects in which an interest or estate may be enjoyed.

Things are either Real or Personal.

Things Real are such as are permanent, fixed and immoveable, as lands and tenements. All other things are in their nature personal as goods money, and chattels answering of the Realty.

2 Hob. 6. 167
384. 387
1 Inst. 118
2 Widdon 4.

Things real are said to consist of lands, tenements, and hereditaments. Land includes all things of a permanent or substantial nature.

Tenement is a word of more extensive import, it denotes every thing of a permanent nature which may be holden corporeal or incorporeal. Land denotes only things corporeal. Not only lands then, but mere incorporeal rights are tenements, as the right of Common &c.

160. on lib. 6.
19. 20
2 Hob. 6. 17.

The word hereditament is still more extensive in its signification, including not only lands and tenements but every thing inheritable, whether corporeal or incorporeal, personal or real or mixed. Thus an heirloom is an hereditament, tho' neither land nor tenement, since nothing real can be an heirloom; but it is a personal chattel by custom descendible.

3 Co. 2.
2 Hob. 6. 17.

All these terms as used in the Law are descriptive only of the subject, in which an interest may be had, but not of the quantity of the interest itself.

Hereditaments are of two kinds corporeal and incorporeal.

Corporeal Hereditaments consist of permanent

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substantial objects all which may be included under the general term Land. Which term not only denotes the soil, but also includes waters & buildings, and all under and above the earth. So that by a conveyance of the Land, is implied a conveyance of the buildings thereon.

1 Inst 2
 { 2 Bl. b. 7.
 8. 19

An action cannot be brought for the recovery of a pool or stream of water so nomine, but must be brought for the recovery of so much land covered by water.

Cl. 8.

Land has also an indefinite extent upwards and downwards, nam cuius est solum, eius est usque ad coelum. And therefore if A erects a building overhanging the land of B an action can be brought for a nuisance.

A conveyance of Land also implies that of all fossils and minerals contained therein, as well as waters, buildings &c. These things however may be conveyed by their own names as distinct from the earth. But water cannot be so granted, since a conveyance of water so nomine is impossible, and it is not a subject of transier. But a right of use and estover in such water can be granted.

1 Inst 2.
 { 3. 2
 2 Bl. b. 18. 19.

An incorporeal Hereditament is a right issuing out of, concerning, annexed to, or inseparable in a thing corporeal. As for instance the right of Common or Way.

1 Bl. b. 20. 21.
 1 Inst 19. 20.
 2 Bl. b. 21. 22. 23.

If A has a right of way over the land of B, it is an incorporeal right exercisable upon the land, but A has no interest in the land.

A right of Common is a right which one has to a profit in or upon the land of another. Thus if A has a right to pasture his beasts upon the land of

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To be has a right of Common Law no interest in the land
To use of the right of fishery or common of piscary. 2 Will. 32

As it respects this latter right the rule appears to be
in rivers navigable and those not so. In navigable river,
or arms of the sea the soil is prima facie in the King or
state, but their right of fishery is common to all the subjects.
But in rivers not navigable the right of soil and fishery
is exclusively in the adjoining proprietors. 2 Inst. 212.
Doug. 225.
2 Roll: 110.
1 Burr: 202.
6 T. 2. 3. 5.
Salk 354.
4 D. R. 219.
2 B. & P. 442.

If then the possessions of two persons are bounded on
an unnavigable river the right of the soil and fishery
belongs to the centre. 2 B. & P. 442.

Thus the soil in a navigable river, as well as the right
of fishery, may be granted to an individual, although prima
facie in the King or state. 5 Co. 101.
Dyer 320.
Hear: 202. 12.
Holt d. 1. 101.
20. 2. 1.
2 B. & P. 442.

The same distinctions as govern navigable rivers
apply to the sea-shore, as between high and low water mark,
that is to say, the soil is prima facie in the body politic,
and the right of fishery common to all the subjects.

When a grant is made to an individual, bounded
by the sea his right extends to low water mark, but tho'
the right of soil extends thus far, that of fishery remains
common. The right of fishery also extends to shell fish,
and the soil may be dug for that purpose.

Estates in Lands, Tenements, & Hereditaments

In estate in lands, tenements, and hereditaments
is the interest the tenant has in them. Thus if one conveys
all his estate in such a place, all the interest that he possesses
in that estate passes. 1 Inst. 245.
2 Inst. 103.
1 D. R. 411.

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120 225
 { 2 Tr. 59
 12 418. 419.
 2 Will 335.
 1126: 414.

This word estate however, is sometimes used to signify the subject in which there is an interest. Thus if a person has an estate in land, and he grants it to B for life, all his interest does not pass, for he has a fee and conveys only a life estate; here then the word estate implies not the interest but the subject.

100. 104

The quantity of interest that a man possesses in a real subject is measured by its duration. And hence the primary division of estates is into freehold and less than freehold. It is not the extent of the subject, that determines the quantity of interest, but the duration of that interest.

100. 104

A freehold estate is one to the conveyance of which being of seisin is necessary at Common Law; except in the case of an incorporeal inheritance that being incapable of being of seisin.

Estates of freehold are either estates of inheritance or not of inheritance. And Inheritance is either absolute or limited.

First of Freehold estates of inheritance.

An absolute inheritance, by which is meant a fee simple, is where a man holds an estate to himself and his heirs, generally, absolutely and without restriction to any particular heirs.

The word fee has the same meaning in the Law in its original sense as feudum, as contradistinguished from allodium, which is an estate which one holds of himself and of no superior. But a fee implies that the estate is holden of a superior.

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The highest estate in Pyriant is a fee simple, which is no better than a feud, the King being considered 'lord paramount'. From which principle lands cohered to him. In 1801 it has been declared that an entail held on a man and his heirs was an allodial estate, whence entails would have been abolished had it not been otherwise retained by statute.

Plato. Bon. }
S. 2, 34)

The word fee is now seldom used in contradistinction to allodium, but merely to denote the continuance or quantity of interest.

2 Bl. C. 105.

Fee then in its ordinary acceptation signifies an estate of inheritance, and when used without any adjunct, or with the word simple, it is in opposition to fee tail or conditional.

The word fee prima xacie means a fee simple, that is an absolute unconditional fee. To a fee limited is intended it must be made known by other words.

The fee simple must vest in some person it cannot in general be in abeyance or expectancy.

There may be however several inferior estates carved out of a fee simple estate consistently with this rule. Thus if tenant in fee makes a lease for twenty years or for life the inheritance still remains in him, and his interest in fee continues the same; the inheritance is not in abeyance.

If it is the reversion after an estate for life is in fee, the freehold becomes immediately his and is not in abeyance. Blackstone says, if a particular estate is limited to A with a contingent remainder - to B, that the inheritance is in abeyance, but it is now settled that the interest remains in the grantor, until by the contingency it vests in the grantee.

2 Bl. C. 107.

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2 M. C. 107
 Earle 252
 (Pearse 250
 255. 256
 267. 273)

Thus if an estate is limited to A for life the remainder to an unborn child of B, A has not power to A for he is only tenant for life, it has not passed to the child for in the ~~supposition~~ it is not yet born, therefore the interest remains in the grantor.

Pittelson and Blackstone agree that if a grant is made to a corporation sole, that the inheritance is in avoidance. It is merely a speculative question, and the decision of it is not important, this however is not the opinion of McQuaid.

2 M. C. 250.

2 M. C. 107.

Lecture 2^d
 May 22^d

To pass a fee simple or any other inheritance by grant, the word heirs is essential, and estate of inheritance of ~~inheritance~~ cannot pass by grant without this word. This rule is positive, and in ~~general~~ the law will not infer such to be the intention of the ^{grantor} ~~grantor~~, without annexing this word.

Thus if I grant Blackacre to A forever, it will be only an estate for life; or if to A and his assigns forever it is still the same. Even if I should grant to A my farm in fee simple, without the word heirs an estate for life only will pass.

The usual mode to convey a fee simple is to A and his heirs forever, the word forever, is not however necessary. Unless the word heirs is used only a life estate will pass.

Little Sec 1

2 M. C. 250.

The word heirs when made use of in a grant is a word of limitation, not of description or purchase. That is, the word heirs is not considered as descriptive of the persons who are to take the estate after the death of

the original grantee, but to determine the quantity of interest enjoyed by them. If it were a word of description, the heirs would be the same as purchase men, and would take as remainder men.

The rule that a state of inheritance can not pass by grant, without the word heirs, does not hold with regard to devises or last wills, the construction with respect to them being much more liberal. For if the intention of the testator was evidently, that a fee simple should pass, the word heirs would not be deemed absolutely necessary. A very much greater liberality being allowed in the construction of devises than deeds.

Comp 659.
2 Bl C. 158.

The construction of deeds being established in feudal times, the strictness and rigidity of those rules continue now and courts are not at liberty to vary from them. But devises were introduced in a more liberal age. Thus if one devises lands to A in fee simple I will take a fee simple estate, tho' it would have been otherwise in a deed. So if he devises his lands to A forever. But if he devises to A and his assigns, a fee will not pass, the intention to pass it not being manifest.

Donny 322.
2 Bl C. 381.
1 Bl R. 672.
4 Burr 2570.
2 Bl C. 108.
Fearn 113.

If one possessing a fee simple devises thus, I give and devise to A all my estate; a fee simple will pass, the word estate generally denoting the quantity of interest given.

Salk 236.
Comp 659.
2 Bl C. 412.
2 Do 657.
4 Do 93.
5 Do 562.
6 Do 34.
6 Do 502.

Some have made a distinction between all my estate, and all my estate at such a place; the latter being thought to denote the subject only, from the word of locality. The first being considered as determining the

2 Bl C. 223.
2 Do 444.
2 Atk 37.

11 May 225.
 Comp 355.
 2 N. H. 524.
 2 Dec 614.
 12 H. 411.
 Comp 308

{ 1 May
 223. 229

* Comp 209.
 11 May 35.
 2 N. H. 510.
 2 N. H. 828.
 Bro B. 437.
 8 N. H. 66.
 2 N. H. 588.
 4 N. H. 175.
 5 N. H. 497.
 1 N. H. 558.
 3 N. H. 356.
 2 N. H. 221. 222.
 " Doug 59.
 1 B. W. 182.
 1 N. H. 258.
 5 N. H. 710.
 " 1 East 37.

* interest. This opinion however is not supported and a fee simple will pass in both cases.

There is a case in which the principle is not settled, thus if one devises all his estate in the possession of J. S., it is doubtful whether any thing more than a life estate will pass, notwithstanding the words all my estate, the connection having led many to suppose, that to have been the intention of the testator.

By the words all my effects real and personal it is held that a fee simple will pass in the real estate. It will also pass under the words all I am worth.

But the word hereditaments does not carry per se an inheritance, as it denotes the subject and not the interest, there must be some other term used.

But a devise thus I give to J. S. all my property conveys a fee simple, denoting the interest.

And the word legacy has been holden to denote an estate of inheritance, where the intention is manifest, and may pass the realty.

The examples given form exceptions to the rules governing deeds, greater liberality being indulged in wills than in deeds. ~~And~~ The rules directing a deed would be the reverse. A man is supposed to make a will inops conativ, & therefore much greater latitude is allowed than in deeds.

But even in a will if I devise lands that word being denotive of the subject only a life estate only will pass.

of Devises

If one devise lands without words of inheritance or perpetuity, but engross upon the devisee the payment of a yearly or any gross sum, a fee will pass. For otherwise he might be ousted by taking the estate if he should die shortly after the devise. He being under the necessity of paying the sum, and his estate terminating upon his death; so that he takes a fee by force of this provision, that he shall such sum.

6 Co. 10.
2 N. R. 348.
Powell 2.
502. 5000.
3 Burr 1523.
2 N. R. 385.
1 Bos. & P. 30.

If I devise all my lands to A, requiring him to pay a certain sum out of the profits of an estate for life only will pass; there are no words of inheritance or perpetuity, and nothing as in the former case absolutely requiring him to pay it, he being only directed to pay it out of the profits.

6 Co. 10.
Camp 299.
2 N. R. 348.
5 East 37.

I devise of lands of a given yearly value with a requirement to pay an annual sum less than that value, gives only an estate for life, there being no words of inheritance or perpetuity. But where the devisee is to pay a gross sum, a fee passes.

6 Co. 10.
52 R. 18.
3 Burr 1523.
1018. 1022.
2 Bl. C. 381.

For the purpose of discovering the intention of the testator, recourse is frequently had to the introductory words of the will. But these introductory words will not then pass a fee, unless there is something else implying that to have been the intention of the testator.

Where the operative words of a devise ~~show~~ imply the gift of a fee, the introductory will not infer it, though often used to prove the intention. So if one devise "I give to all my estate, I give it in the manner following" and then devise Blackacre to A, it will pass only as a life estate.

3 Burr 1523.
Camp 299.
306. 660.
52 R. 18.
14. 582.
3 P. W. 292.
52 R. 18.

{ 1 R. R. 116.
2 R. 270.
2 East 97.

The circumstance of a will being attested by three witnesses, is not sufficient in itself to pass a fee; for this is almost absolutely necessary to have three witnesses, to attest a devise of her real property, it is often the case that they are employed. But therefore although it is necessary to employ three witnesses to attest the devise of a fee simple, the mere circumstance of there being three will not of itself pass a fee, although it may do in some cases, a will otherwise ambiguous.

{ 2 B. C. 103.
2 B. 354, 357.

There are some other exceptions to the rule that the word heirs must be used. The word heirs is not necessary to pass a fee in a fine or common recovery. The fee here passes by act and operation of law.

{ 1 B. C. 404.
2 R. 109.

But in grants to corporations, and the word heirs is not necessary, it is indeed improper. But the word successors should be used. But in a grant to a corporation aggregate, neither the word heirs nor successors is necessary, for such corporation in judgment of law, never dies, nor has successors.

On the same principle, in a grant to the king the word heirs or successors is unnecessary.

{ 2 B. C. 21, 206, 7.
46, 22, 79, 8.
90, 92, 111, 107.
112, 122, 292.

{ 1 Co. 43.
104, 165.
11 R. 79, 82.

Again - heirs is not a word of description or purchase. If a grant of land is made to A and his heirs, the word heirs only shows what interest he has, and he will be at liberty to alien, and perhaps his heirs will never take. And also if a grant is made to A for life remainder to his heirs, "he will take a fee simple, and if, to A for life remainder to B for life, remainder to the heirs of A," here A takes a fee simple at first subject to B's estate for life - Shelley's case -

In both cases the remainder is immediately in the ancestor, in the first case it vests in possession, in the second in interest.

The same rule apply, "mutatis mutandis", to a limitation to A and the heirs of her body, he will take a fee simple tail.

These cases may seem arbitrary, but there is good reason for them. For if the word heirs was a word of purchase or description a fee could never be created for if the heirs took as remainder men, they would take only an estate for life, and then it would be as if given to A for life & then to his heirs for life; he here took all that the testator has described. And thus the design of the testator would be defeated. And the word heirs cannot be used in two senses. A general intent must prevail in preference to a particular. And it was evidently the general intent of the donor to pass a fee simple; his particular intention to restrict it to the children, but such restriction to the children would defeat a fee simple, and therefore a fee simple vests in the father.

There is a feudal reason which has now ceased for if the heirs took he, descent due, paid a fine to the feudal lord, but not if they took as remainder men, which probably had some effect in settling this rule.

Heirs being regularly a word of limitation, & a devise to the heirs of A conveys no estate unless A dies before the testator, for none est heres viventis, and it does not appear who is his heir until his death.

2 Ben 313.

1 Ha. 392.

Comp 312. 314.

If however it appears that the word heirs was used as a word of description or purchase, the heirs will take. Thus if the devise be "to the heirs of A now living", it shall go to the presumptive heir of A. even before he dies.

2 Bl R. 1010.

2 Bur 200.

1 Ha. 231.

2 Ben 313.

1 B. & W. 220.

1 Anst 421.

An estate "to A and his heirs", cannot be in any contrary to the nature of such estate. If there be a devise "to A

1 Anst 13.

Long. 329.

3 B. & W. 01.

and his heirs provided he shall not alien" or shall not devise, "such a proviso is void, as being contrary to the nature of the estate granted.

Lecture 3^d.Mar. 2^d. 1818.

Limited Fees.

Limited fees are such estates of inheritance as are clogged with conditions or qualifications of any kind.

Limited fees are of two kinds first qualified or base fees, and fees conditional; which latter are called fees conditional at Common Law, to distinguish them from a new species of estate created by the statute *De donis conditionalibus*.

A base fee is one that has a qualification annexed, and must determine, when that qualification is at an end. As in a grant to A and his heirs tenants of the manor of Dale, when they cease to be tenants of the manor of Dale, this base fee determines.

A fee conditional at Common Law is one that is restrained to some particular heirs of the grantee, as the heirs of his body or heirs male, or female. It differs from a fee simple in this that it is to particular heirs, but a fee simple is to all, collateral and linea. It is called a conditional fee, because being thus limited to one and the heirs of his body or some particular heirs, a condition is implied, that if the grantee dies without such heirs, the estate shall revert to the donor.

In case of a fee conditional, if the grantee had issue the estate became absolute, the condition being performed. It was absolute for three purposes. 1st to enable the grantee to alien. 2^d to subject the estate to forfeiture for his offences. 3^d To enable him to charge the land so as to bind the issue.

But if the grantee had issue, but did not alien during the life of such issue, and if he dies the estate will revert to the

1. Inst. 2.
2. Bl. 119.

1. Inst. 241.
2. Bl. 104.

1. Inst. 17.
2. D. 238. 284.
2. Bl. 111.

the donor. The land could not in the words of the grant descend to him, but the particular heirs, and there being none, it must revert. But if the original grantee were leaving such issue, the estate became an absolute fee in that issue. *contra. 2 Co. 187.*

The consequence of the construction given to these gifts, that by the birth of issue the grantee could survive, the statute of donor 2^d was made, which provided that the donor's intention should be regarded: restricting the power of the original grantee of defeating the issue by alienating the estate to their disinclination. And thus the estate should go to the issue at all events, but upon failure of such issue should revert to the donor.

Upon the construction of this statute, the judges held that the birth of issue was not a performance of the condition, so as to vest in the donee an absolute fee simple as soon as such issue was born, but they divided the issue into two parts as it were, leaving in the donee a kind of particular estate called a fee tail; and vesting in the donor the ultimate fee reversion as the land expectant on the failure of issue; which expectant estate is called a reversion.

2 Inst. 172.
Little 112.
2 Pl. C. 112. 113.
1 Br. Ch. 526.

A fee tail is unknown to Common Law but is a statutory estate altogether.

But this statute did not convert every fee conditional at Common Law, into an estate tail, because the only word used to denote the subject is tenements. But an incorporeal estate not savouring of the realty cannot be entailed, and not falling under the denomination of tenements, remain as at Common Law.

1 Inst. 19. 20.
144.
2 Pl. C. 21. 113.
1 Br. Ch. 325.

A hereditament incorporeal not savouring of the realty, is the only subject of a fee conditional at Common Law. Ex. gr. An annuity is a hereditament; which savours not of the realty, and may be granted

is a fee conditional at Common Law.

It is not personal chattel cannot be devised, nor if granted to one and the heirs, in any way, does it create a fee conditional. For a mere chattel is not deemed as high an estate. It provided even if the lowest owner is much higher than a chattel interest of the next owner. So that if chattels are given to one and the heirs of his body, he takes an absolute estate in such chattel interest.

But the an estate tail cannot be created in a chattel, yet a remainder in a chattel interest, and personal chattel, may be limited after a life estate by way of executory devise.

Thus if a chattel is limited to A for life, and on his death without issue he B, the remainder is good to B, after the life estate. If B would that in real estate, would create an estate tail by implication, will create a remainder in a personal chattel.

An estate tail may be created in a devise by implication, but it cannot in a deed.

So also if a devise is made "to A and his heirs forever" (which of themselves give him a fee) and if he dies without issue to B, it takes an estate tail, for the generality of the words heirs, is afterwards restrained by the term issue or heirs of his body. This is the case in a devise, not in a grant.

Again, it has been settled that if land is devised thus "to A and his heirs forever, and if he dies without ^{his body} heirs to B", that this will pass an estate tail to B provided B is a collateral heir to the devisee. For B being such a collateral relative, it shews that the donor did not use the word heirs to signify all heirs, but heirs of the body, and not heirs general. Estate Tail are General or Special.

An estate in tail male is limited to one and the

12mo. 20.
2 Bl. 6. 174. 395.
1060. 78.
89. 95.
111. 259.
Dean 304.
305. 322.
fourth Edition.

111. 669.
9. 230.
13. 208.
11. 215.
33. 83.
96. 124.
11. 105.
3. 298.
Barp 232.
Dean 140. 300.
2 Bl. 115. 381.
2. 143.
301. 302.
72. 246.

Barp 232.
5. 387.
3. 122. 126.
8. 211.
11. 112.
11. 112.
11. 112.
11. 112.
11. 112.

Great B. 2. 114

heirs male of his body, in fee female to the heirs female. And in Little Pl. 2. 114 there cases the words must be derived wholly from the set to which the estate is limited.

2 B. 25.
2 Bl 114.

As the word heirs is necessary to create a fee of any kind, so the words of the body, or some other words of procreation is requisite to create a fee tail, for otherwise the heirs are not limited, and none being designated the heirs general would take.

1 Inst. 20.
2 Bl 114.
115. 381

If then in a grant or deed such words of inheritance or procreation are omitted, a fee tail will not pass. Thus in a grant "to A and his children": "to A and his heirs": "to A and his offspring": in all these cases no fee tail is created; the children may sometimes take with him as joint tenants, but he otherwise takes only an estate for life.

But if words of inheritance are limited, by other words than those of procreation, such limitation has no effect; for it would be creating a new kind of estate. Thus an estate "to A and his heirs male general", will be a fee simple and go to all his heirs. An estate can be created, and since the words are taken most strongly against the grantor such grant creates a fee simple. But this rule of construction does not hold against the king in England.

Little Pl. 31.
Con L. 1 Inst 27.
D. 30
2 Bl. 338.
2 Bl. 115. 121.
2 Bl. 338

But in a devise thus, "to A and his heirs male" an estate tail will pass. Thus then is a case of creating by devise an estate tail without words of procreation. The intention is a devise to be observed, but in deeds certain technical words are required, they are indispensable, and no others will answer.

2 Bl. 247
2 Bl. 381

And a fee tail may be created by devise without words of inheritance - Thus "to A and his seed" or "his offspring" will pass a fee tail.

So also if land is devised "to A and his children" or "his issue," he having no children at the time a fee tail will pass. The intent of the testator evidently was that the children should take in some way or other, they could not take with the father not being in esse; nor can they take as remainder men, the devise being immediate and not by future executory limitations. They must take either with the father or as remainder men, they cannot be excluded from physical inheritance, nor the second from it or not being the intent of the testator, they must therefore take by inheritance.

But in a devise "to A and his children" he having children at the time, the word children being of an ipso facto, not of inheritance, they will take as joint tenants with their father for life only, and none but those in esse at the time will take.

If a devise is "to A and after his death to his children" he having children he takes an estate for life, and they a remainder for life; for there are no words of inheritance, and the words imply a future estate to the children by way of remainder. In this case the after born children will also take, for such devise is prospective as to the time of the grantor's death. Mr Gould thinks that it would be the same if the devisee had no children at the time. If the devise had been immediate, it might be considered that he took a fee tail immediately. But if a devise is "to A for life and after his death to his children," tho' he has no children at the time, his future children ought to take for life after his death, as well as in the latter case, where after born children take with those in esse at the time. This is not decided upon, and has been contradicted by way of argument in one case.

20. 11. 19.
Kent 227. 231.
1 Buls 219.
{ Done 300.
309. 311.
1 Co. 400. 400.

6 Co. 11. 12. B.
Co. 11. 12. B.
Cous. 14.
1 Co. 11. 14.
1 Co. 202.

1 Co. 11. 12.
1 Co. 11. 12.
2 Co. 11. 12.
1 Co. 11. 12.
1 Co. 11. 12.

1 Co. 11. 12.
1 Co. 11. 12.
1 Co. 11. 12.

2d Tail Real Property

If an estate is limited to A and wife the heirs female of his line, the females only will inherit although he has a son who is capable of speaking his heir.

Lecture 5th
1 New 25. 1813.
1 Inst 225. 215.
1 Rot. 17.
1 Rot. 35

It was formerly held that if the estate was limited to the female heirs as daughters, that if the decedent had a son, that the daughters could not take. But this reason was that the father was his issue, that they were not his heirs. But this is not necessary as conformable to Law. And when an estate is limited to A for life, and then to his heirs female in remainder, his heirs female will take tho he has a son, the word heirs being of description.

1 Inst 15. 27.
1 Rot. 25.
5 New 2. 15.
1 Rot. 222.
1 Inst 336.
2 Rot. 1.
1 Rot. 18. 62.
1 Inst 32. 147.
1 Rot. 24. 217.
1 Rot. 20.

Incidents to Estates Tail.

The incidents to a tenancy in tail are 1st the tenant is not liable for waste 2^d his wife is intitled to dower. 3^d the husband is intitled to tenancy by curtesy. 4th The entail may be barred, or ended by fine or recovery, or by linal warranty descending to the heirs with a proviso. For a description of fine and recovery, & linal warranty, see

1 Inst 222.
2 Rot. Co. 115. 116.
2 Rot. 243. 262.
2 Rot. 305. 303.
4 Rot. 604. 607.
8 Rot. 61.
2 Rot. 602. 602.
8 Rot. 61.

The right of tenants to have a fine, or suffer a common recovery, is inseparable from the nature of an estate tail. Therefore an estate tail is limited with the provision that the tenant shall not have such a fine or recovery it is void being contrary to the nature of such estate.

In Connecticut it is provided by statute, that every estate tail shall become an absolute fee simple in the issue of the original donee. This was the case of a fee conditional at Common Law. Vide Appendix — page 1st.

1 Inst 32.
1 Rot. 33.

Freeholds not of Inheritance.

All freeholds not of inheritance, are estates for life or years, and this is the lowest species of real estate.

2 Bl. 20.

Freeholds not of inheritance are either conventional or legal; that is created by the contract and agreement of the parties; by the act & operation of the Law.

Conventional estates for life may be for the grantee's own life; or for the life of another; or for any number of lives; in which latter case the estate will continue as long as any one of the lives remains.

Legal estates for life, or those created by operation of law are only for the life of the tenant; never for the life of another. An estate then pure autre vie is always conventional.

Where an estate is granted to one for the life of another, the estate must continue after the death of the tenant. If the estate is limited to A and his heirs ~~after~~ for the life of B. and A dies first his heirs will become special occupants. But if not given to A and his heirs it is at law considered as given to the first occupant. But by statute 24 Geo. II. c. 20. it is provided that a person holding an estate for the life of another, can devise it, and if he omits thus to devise it, it will go to his personal representatives. So that there is now no such thing as a *hereditas jacens*.

The general words made use of in the statute of Connecticut, afford reason to suppose that such an estate is there devisable.

An estate for life being a freehold could not pass at Common Law without livery of seisin. But this rule of Common Law is now generally waived by conveyances by lease & release &c.

A general grant of lands, tenements & hereditaments

2 Bl. 120

2 Bl. 207

1 Port. 41.

2 Bl. 258. 201.

1 Port. 42

2 Bl. 201.

not defining any specific estate, or quantity of interest, gives 1 Inst 42. 36.
an estate for life to the grantee. He takes as great an estate 2 Bl. 121.
as the words will admit.

Any estate except that of inheritance at will or
a life estate, having no limit of duration, but which
may continue during the life of the grantee, is a life estate.
If an estate is limited to a widow during her widowhood,
or to one until he shall marry, or until he dies, all these
incidents which may or may not happen during
the life of the grantee he takes a life estate, determinate
upon the happening of these contingencies.

2 B. 20.

1 Inst 42.

2 Bl. 121.

Incidents to Life Estates.

The incidents to a life estate are that the tenant
is not restrained by agreement, many of common right take
reasonable doers. That is necessary, wood for the use of
the house & farm, as for burning, repairing fences &c. &c.
But he has no right to cut down timber for other pur-
poses, as he would then be guilty of waste, and become sub-
ject to a forfeiture of his estate, and to liability for damages. 1 Inst 41. 53.

But of common reason he is allowed these doers, because 2 Bl. 35. 122.
otherwise he cannot enjoy the estate and keep it in repair.

2. Tenant for life is not to be injured by any sudden
determination of his estate, unless by his own act. Thus if
he dies after sowing & rearing a crop, before the harvest, his
personal representatives shall have the emblements. Nam
actus. *Dei nemini facit injuriam*. The word emblements
signifies those crops which are the result of annual labor.
The same rule holds in case of an estate for *inter vic*.

1 Inst 55.

2 Bl. 122.

Real Property

This rule also holds where the estate determines by the operation of law.

2d. If an estate is limited to husband and wife during their coverture, and there is a divorce a vinculo matrimonii, the husband shall enjoy the emblements.

But if the estate is determined by the act of the tenant himself, as if he forfeits by waste or any other fault he shall not receive the emblements. Thus if a woman proposing an estate during her widowhood marries, it is her own act and she forfeits the estate, and also loses the emblements.

3d. As to under tenants or lessees of the tenants for life, they have not only the same but sometimes greater privileges than the tenants for life. For in some cases they shall have emblements even where the estate is determined by the act of the tenant for life. As for instance a lessee of the widow in the case above mentioned, the estate not being determined by any fault of his. But if such lessee has himself married the widow, he would lose the emblements being a party to the act by which the estate is forfeited.

And at Common Law an under tenant might on the death of the superior have the premises and avoid the payment of a rent from the time of the last day of payment, but not being proportionable at Common Law, but considered as not accruing until the day of payment. But now by the Statute 11, 25 he is obliged to pay pro rata.

And it is true of every under tenant for life that if he continues for a number of years, and dies before the expiration of that term, that the estate of the under-tenant expires, unless the remainder man or reversioner con-

127

124.

Little Rec 516.

3 Bac 397.

Park 155.

because the case. For otherwise he might defeat the claim of the remainder man or women. Cov. 452.
1 B. N. 30.

Life Estates created by act & operation of Law.

Life estates by operation of Law are of three kinds: 1st Ten. 1 in tail after possibility of issue extinct - is where a special estate tail being limited, and the person from whose body the issue was to come has died without issue, or having no issue, that issue is extinct. The estate was originally one of inheritance but it has become impossible for it to remain, being by its creation an estate in tail special and the issue being now extinct. Now this species of estate is called an estate for life, because tho' originally an estate of inheritance it has now ceased to be so. Little Sec 32.
2 Bl. C. 124.

Such an estate must be created in the manner above mentioned, that is by the death of the person from whose body the issue was to spring, for no limitation, conveyance or other human act can make it. 2 Bl. 125.
1 B. N. 29.

If an estate is limited to a man and his wife and the issue of their bodies, and then an assumed sister of them has the estate, but the issue extends for life, notwithstanding the inheritance is over in them. A possibility of issue is always supposed to exist in the line, unless extinguished by the death of the parties. Litt. Sec 44.
1 B. N. 25.
2 Bl. 125.

His estate is of a mixed nature it resembles a tenancy for life, but does not lose all the incidents of an estate of inheritance. The tenant resembles a tenant for life, in that he forfeits the estate by alienation in fee. But like a tenant in tail he is not liable to forfeiture by waste.

But although such tenant does not forfeit for waste yet

2 Bl. 241.

2 Bl. 125.

2 Bl. 125, 126.

if he cannot waste, as cutting timber the timber will not belong to him, but belongs to the person who during a short time, has the first estate of inheritance in the land. But the person must be a living remainder man. The reason seems to be this. The timber being cut becomes personal property and liable to decay, and it would be inconvenient to consider it as resting on contingency, as for the birth of one who may never be born. It should therefore vest in some one in fee. In other respect, this tenant resembles a tenant for life, and may exchange with such tenant.

Curtsey.

Litt. 350.

A wife inherits of the real estate in entire tenancy by the Curtsey of England. A tenant by Curtsey is one who having married a woman seised of an inheritance, and having since born alive a son of inheritance, and the deceased being dead, becomes a tenant in fee in such estate.

Litt. 350.

2 Lev. 20.

2 Bl. 125, 126.

1 Inst. 113, 114.

{ 29. 46

To this tenancy there are four requisites Marriage, Birth of the wife, Birth of inheritable issue, and Death of the wife. 1st. & legal marriage is essential to tenancy by Curtsey. 2^d the wife must have been actually seised; a bare right will not entitle the husband to Curtsey, for the issue could not then have inherited.

2 Inst. 113.

4 Inst.

2 Inst. 113.

It has been determined in Connecticut, that the actual seisin of the wife was not necessary, to make the husband tenant by Curtsey. The reason given was that the heir could inherit without such seisin. But Mr. C. thinks, that the decision was questionable, for tho' he cannot take by Curtsey, without having inheritable issue, yet the converse may not hold true, that because he has issue, that he shall take.

It is a consequence of the English rule that, there cannot

be a tenant by Curtesy, in an estate in remainder or reversion, the wife not being actually seized. But the issue can inherit a remainder or reversion, if therefore the remainder in the last mentioned case were good, the husband could be tenant by Curtesy of a remainder or reversion in England but it has been decided otherwise. A reason why, if the wife has not been actually seized, the husband cannot be tenant by Curtesy is that it is considered as being the fault of the husband, as neglecting the rights of the wife and children. This is not the only reason, but one that is weighty.

Co. L. 29. 40.

A husband may be tenant of incorporeal hereditaments, where seisin is impossible but there should be what is tantamount to a seisin in corporeal hereditaments.

If a man marries an idiot he cannot be tenant by Curtesy of her lands, since she could never be rightfully seized of lands.

2 Bl 127. 130.

Moule 263.

Inst. 30.

1st The issue must be born alive, the law requires that the issue be born during the life of the mother, for in a posthumous birth the husband cannot take as tenant by Curtesy, and the issue must be capable of inheriting the estate. Thus if an estate be to a woman and her heirs male, if she has only daughters, the husband cannot take as tenant by Curtesy. The time of the birth of the issue is immaterial, it is during coverture, whether before or after seisin, or whether strictly before her death.

Inst. 29. 30.

2 Bl 127. 128.

P. 4.

P. 4.

A husband may be tenant by Curtesy, in an equitable interest of the wife, as in a trust estate and in an equity of redemption.

How on Mortgage

112-115

Atk 502

From the birth of the issue the husband becomes tenant by Curtesy in the estate not being consummated until the death of the wife.

1 Inst. 30.

2 Bl. 28.

Dower
Tenancy by curtesy

Section 3^d

May 23. 1875.

Little 2^d.

2 Bl. 30. 14

Tenancy by dower is an estate given to the wife of a deceased husband of all estates of inheritance, of which her husband was seized at any time during his life, provided that any issue of issue of the marriage might or possibly have inherited.

To enable the widow to this estate she must have been the lawful wife of the decedent at the time of his death, for this right accrues only at the time of the death, and out of the marriage relation then subsisting.

2 Bl. 32.

But the wife is not barred of her dower by a divorce a mensa et thoro for this does not dissolve the vinculum matrimonii.

1 Port. 31.

2 Bl. 31. 15.

It was formerly held that if a woman married an alien, that she was entitled to dower on his death but the rule is now settled otherwise, for the parties were incapable of entering the marriage contract.

2 Bl. 31. 15.

It was a rule of the old Common Law, that the wife of a traitor was forfeited by the treason or felony of the husband, the rule was abrogated by the statute 1 Edw. 6. but again revived against the wives of traitors by statute 5 Edw. 6.

They have no such statute in Connecticut, and there can be none under the constitution enacted by government which shall work a forfeiture of dower.

1 Port. 31.

2 Bl. 31. 15.

If a man marries an alien she cannot be endowed by the general Common Law. For it is a general rule that such an alien cannot hold lands. It is usual in such cases to apply for a special statute authorizing it.

5th

No woman can be endowed unless she is above the age of nine years at the death of her husband.

Power of Dower.

The estate in which the wife can have dower, must be one in which at once which she might have had might be of such nature as to have taken an inheritance. The law does not require that the wife should actually have had issue. Therefore if one dies in fee and a son by his first wife, and marries a second, she shall be entitled for on the death of that son her issue might have inherited.

2 U.S. 36. & 3.
2 Bl. 6. 131.

But if one holds an estate to himself and the heirs of his body by his wife, & a second wife on the death of the husband shall not be entitled to dower for her issue could never have inherited.

The law does not require even besides that the husband should have actual issue if he has a right of present issue it is sufficient. The diversity between this case and that of *Gurley* is, that the wife cannot have it in her power to gain actual issue during the coverture, and of course can be guilty of neglect. And a right of her husband, however short, is sufficient as far as regards this present point of issue. The whole land is granted from the mother in the same act by which it is given to him, and does not divide in him a remainder as by a fine &c. it is determined.

Probly 503.
1 Inst. 31.

Co. 1. 515.
2 B. 6.
2 Bl. 6. 132.

In Common Law the husband cannot divert his wife of her right of dower by any act of his during coverture; for her right of dower is that of creditors or pledgees. She has an interest in the land from the time of marriage.

Inst. 32.

The rule is the same in New York and Massachusetts, but in Connecticut the wife can only be endowed of thirds of what the husband at dies seised. A husband may therefore divert not his right of dower, at any time by alienation.

stat of Con
Title 10
Sect. 1.

In England a wife is not entitled to her dower in

2d Ed 6105.

1d Ed 603.

30 229

1d Ed 6105

2d Ed 6105

1d Ed 6105

151

1d Ed 6105

1d Ed 6105

1d Ed 6105

2d Ed 6105

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an equity of redemption of a mortgage in fee.

The reason of the difference between Dower and Curtesy in this respect is that the law regarding dower, was enacted when an estate of redemption was purely a trust estate, and the mortgagee's wife considered dowable, and it would be perfectly proper in those cases that both the mortgagor's and mortgagee's wife should now be entitled to dower. But the law is now changed in this respect, and the mortgagee's wife can take nothing, tho' the old rule defining the mortgagor's wife remains the same.

This question has been decided in Eng. that the wife in such case is entitled to dower. But even in Eng. the mortgagor's widow is entitled to dower in the reversion as tenant on the mortgage for life or for years. Tho' in the life estate or term itself she has no dower.

In the Common Law dower is to be assigned to the widow, by the husband's heir, or if he is under age by his guardian. The heir becomes tenant by his entry to the whole freehold and the widow is considered not as a joint-tenant but as an under-tenant to him.

If the heir or guardian does not assign her dower or assigns it improperly, she has her remedy at law, and under the Statute the sheriff assigns it.

In England the wife forfeits her dower by elopement with an adulterer, unless the husband is afterwards reconciled to her; by the treason of her husband; by detaining title deeds from her; by alienation by deed or otherwise either in fee or for the life of another, or total divorce.

vide Statutes 24 & 40.

1d Ed 6105

2d Ed 6105

But the wife may bar her right of dower by buying a fine or suffering a recovery with her husband jointly, coheirs, &c. 2 - 107
 But she cannot at Common Law be joining with him in a grant after making a voluntary conveyance, she is estopped from saying it was a joint conveyance, and this is the reason that that mode of conveyance shall prevail against her, and not because she is estopped to be deemed capable of transferring. It acts strictly in way of estoppel.

In Con: the wife is not barred of her dower by Stat Con 239.
 a total divorce, unless she be the faulty cause of it. But here as well as in Eng: a wife may be barred of her dower by accepting a jointure before marriage. In equity indeed she may be barred after accepting a jointure after marriage. It has been made a question in Con: whether under their statute, a jointure of personal estate may not bar the wife of dower. Decided not.

All estates for life whether conventional or legal are forfeited not only for felony and treason at Common Law but also for waste - alienation in fee, or in tail, or for the use of another. Little 245.
 1 Inst 251
 2 Bl C 207
 274.

Estates less than Freehold

Estates less than Freehold are of three kinds. 1st Estates for years. 2^d at will. 3^d by sufferance. At this day indeed there is hardly any such estate known as estate by sufferance.

An estate for years is an estate for some determinate period already ascertained, thus an estate for 20 years Little 250.
 or for one year or for three months is an estate for years as years being the smallest period noticed by the law.

Real Property

2 Bl. 61.

2 Bl. 614.

He who creates such an estate is called the lessor, and he who takes it the lessee.

Bl. 615.

By a year it Common Law is meant an entire calendar year, but by a month is meant a lunar month, the by the lessor in a twelve month is meant a calendar year. In general the law takes no notice of the fractional parts of a day. A lease is considered as having been made at the time when the day commences.

On the same principle if any one is born before twelve o'clock in the night of the 31st of December he is at full age at the beginning of that day.

2 Bl. 615.

2 Bl. 615.

1 Bl. 615.

Bl. 615.

Every estate which must by its own limitation expire at a certain period prefixed, is an estate for years. Such estates are called terms. It is said that an estate for years must have a certain beginning as well as a certain termination. This is indeed true, but from the nature of the case an estate for years always will have a certain beginning. One with respect both to beginning and termination it is a maxim id certum est, sub certum reddi potest. So that a lease for as many years as I.P. shall name is good.

Bl. 615.

2 Bl. 614.

But an estate for so many as I.P. shall live is void. This rule is founded on strictest principles of law, for the duration of it is not ascertained. But why will not such an estate be as good as an estate limited to it for the life of I.P. Here this cannot be an estate for the life of I.P. for if it were there must be livery of seisin. But it cannot be an estate for years, because it has no prefixed period of duration. It lasts for twenty years however if I.P. shall

so long time is good, because there is a time ascertained beyond which the estate cannot extend, tho' in a certain event it may be defeasible before that time.

1 Inst 25.

2 B.C. 4. 25.

An estate for years is a chattel interest and is personal estate. Hence it is inferior to life estate. Every person is not necessary to have it.

5 Co 94

2 B.C. 123-4.

A consequence of this is, that a term may be made to commence in futuro. But a life estate being made in every of person must from the nature of livery commence in present.

Hence a term for years cannot with propriety be said

1 Inst 45

to be seized for years in the possession of the freehold.

2 B.C. 144.

The word ~~term~~ ^{term} is used to signify not only the duration of the interest, but by a natural transition the estate

of a lease is made to A for three years, and after ^{the expiration of the term} ~~the~~ remainder to B, and A surrenders or forfeits his lease at the end of

one year, B's interest shall immediately take effect. But the remainder has been to B from and after the expiration of the said three years, no interest would not commence in the said term has fully elapsed.

1 Inst 45.

2 B.C. 144.

Incidents

Lecture 5. 7.

May 21st 1878.

A tenant for years unless restrained by special agreement is intitled to the same covenants as tenant for life.

2 B.C. 142.

144.

But he is not generally intitled to covenants on the determination of the estate by the terms of it; for the tenant knows when the estate is determined, & if his crops are not ripe at that time it has own fault or folly that he made such a contract.

2 B.C. 144.

If however the estate is defeasible on a contingency

1 Inst 50.
2 Bl C 145.

before the expiration of the time for which the lease is made and if the contingency happens the lessee is entitled to emblements. But if the contingency depends upon the tenant himself, he is not thus entitled tho' the contingency happen.

1 Inst 50.

If a lease be made to A for twenty years if he so long live, and he dies before the expiration of the term, the executors will take the emblements.

Estate at Will.

Littl C 68.
2 Bl C 145.

An estate at will is defined to be one determinable at the pleasure of the lessor. It is also determinable at the pleasure of the lessee. The definition is not therefore correct.

1 Inst 50.
2 Bl C 145.
Littl S. 69.

The lessee then has no certain measurable estate for any period. But if the lessor determines the estate between the time of sowing and harvest the lessee will have the emblements. But if the lessee determines it he is not entitled to them.

2 Inst.
1 Vent 88.

The estate may be determined by the express declaration of the lessor, that the lessee shall hold no longer.

But this declaration must be made on the land, or notice of it must be given to the tenant. It may also be determined by an act of ownership by the lessor at entering and entering another.

1 Roll 800.
2 Lev 88.

So it is determined by the lessor's making a feoffment of the land or a lease to commence immediately.

5 C. 416.
{ 1 Inst 52.
55. 12.
2 Br. 145.

The estate may also be determined by the lessee's assigning his interest, committing waste, or by the death or outlawry of either of the parties, or by the express declaration of the lessee. A tenancy at will is not in its nature assignable. Death disposes the estate for the consent can no longer

Real Property.

continue, so an outlaw can no longer counsel in judgment of law. Litt 1. 69.

If the rent is payable quarterly or annually, and the lessee determines the estate he must pay the rent to the end of the current period, tho' the rule is otherwise if the lessee determines it. 12d 339. Salk 214

These estates have lately been construed in all cases to be like a tenancies from year to year while both parties remain. Courts first began thus to construe these estates, when there was annual rent reserved but now I believe all are thus construed. 2 Bl C 147. }
145. 6th Eds }
8 J R. 3. }
Cop Dig 460. }
2 Bul 1609. }

The difference between tenancies at will and those from year to year, is that the latter cannot be determined at the pleasure of either party except at the end of the year, & then not without reasonable notice, which is generally holden to be half a year. Now this is now the rule as to estates which by the words are estates at will.

As if either party dies notice is necessary as tho' he were alive. As if the lessee dies the lessor must give notice the lessee, if he would determine the estate. So if the lessor dies, his executor must give notice to the lessee.

In the English statutes of frauds & perjuries, it is enacted, that, parol leases for more than three years, shall be construed as an estate at will. But these will operate as leases from year to year. 8 J R 3. }
2 Bl C. 145. }

In Scot. no parol lease for any term however short is good as a lease. It is not even a lease at will, it operates merely as a license to occupy a house or a shop.

real Property.

Estates at will therefore can now in England hardly be said to exist. And now take the rule to be that all estates of this kind are construed as estates from year to year.

It follows from rules already stated that notice to quit at any time except at the end of the year has no effect.

12 R 159.
12 R 159.
12 R 311.
2 M C 148 nt.
* 2 M C 219.
* 2 M C 149 nt.
12 R 311.

Still however if general notice is given & no time is specified, the party giving it is presumed to refer to the end of the year, & this notice is good.

If the landlord having given notice to quit at the end of the year ~~he~~ receives rent accruing after that time he waives the notice; and must give notice again to remove the tenant.

2 Br Ch 101.
{ 2 M C 147.
 Notes

If the notice is not good for the year in which it is given, it is not good for any succeeding year.

P. A.

But want of notice can never be set up by one who denies the landlord's title. For he cannot then be considered tenant from year to year; as there is here no presumed consent that he shall thus hold.

12 R 102.
{ 1 How on Cow
 135. 258

If there is a lease for a year and the lessee continues in possession after the year, with the lessor's consent, he is considered tenant for another year. But he is not from year to year.

Estates at Sufferance

* M C 150.
12 R 311.

If one comes into possession of land by lawful title and continues afterwards in possession without title he is tenant at sufferance. As if one who is lessee for a year holds over without leave of the lessor.

* 3 M C 25.
2 M C 159.
2 M C 158 nt.

Formerly if a lease at will was made & the lessor died, if the lessee continued in possession, without leave he was held to be tenant at sufferance. But now tenant from year to year.

This estate may be determined at any time by the entry of the owner. But it cannot be determined without some notorious act of the owner, manifesting that there is no title in the holder.

But before entry he cannot bring an action of trespass against the tenant *quod clauum fregit*.

If then ^{one} holds over and becomes tenant at sufferance. Inst 5. He is not liable for trespass, the rule of law being, that the presumption of the tenant's lawful possession cannot be rebutted but by actual entry.

And when this entry is made the owner may maintain ejectment. Mod 984. 2 Bl C. 151.

In Connecticut I do not know that actual entry is necessary in any case for the purpose of maintaining ejectment, and this is not necessary in dictum of law. It follows then that if this is so, that there is no such estate as tenancy at sufferance. The owner may sue the tenant a *tertio* lessor without entry or notice.

And now by statutes 4 and 11 George 2^d this title of tenancy at sufferance is almost destroyed. 2 Bl C. 151.

A tenant at sufferance is not entitled to notice to quit. 12 R. 58. 102. 2 Bl C. 150. }

Entry is sufficient, and the action may be brought immediately after the entry. 157 Note }

Estates in Possession, Remainder & Reversion. { New Feoff. 2 on Conting. 211 }

I am now to consider estates as to the time of enjoyment. They are either estates in possession or reversion. 2 Bl C. 102.

Reversions are of two kinds, one created by the act of the parties, & called a remainder, and the other by operation of law called a reversion.

Real Property
Estate in Fee Simple.

Of estates in fee simple little need be said. All estate spoken of are considered as in fee simple, unless it is otherwise expressed.

2 Bl. 615.
Pearce 1
How on L. 249.

By this estate a present interest passes, together with a right of present enjoyment.

An estate in fee simple as in contradistinction to an estate in expectancy does not require present possession or enjoyment, but a right of such possession & enjoyment.

1 Inst. 23.
2 Bl. 614

An estate in remainder is one limited to take effect after another estate in the same subject is determined.

These two interests one in fee simple, and the other in expectancy are considered in law as one estate.

2 Wils. 185
2 Bl. 614

Thus an estate to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee, make one entire fee.

Macle 29
2 Bl. 614

It follows then that no estate can be in remainder can be limited after a fee simple, since there can be no remaining or reversionary interest.

How on D. 242.
Pearce 184.
H.C. 170.

The most proper word to create a remainder is the word remainder itself. But this is not indispensable. Other words discoverable of the intention are sufficient. So if the grant be to A for life and then to B or after that to B. B will have a remainder.

2 Bl. 615.
1 Inst. 40.
Pearce 25. 34.
How on L. 242.

General Rules respecting Remainders.

To create a remainder there must be some particular precedent estate to support the remainder and this is called the particular estate.

2 Bl. 615.

If the enquiry is why there must be a particular estate, I rather the word remainder et in terminis implies one

Remainder

But there may be an estate to commence in futuro provided it be only a chattel interest, not a particular estate. But this is not a remainder. So if an estate for years be created to commence 20 years hence, this is not a remainder tho' it is a future estate.

But at Common Law a freehold cannot be created to commence in futuro except by way of remainder.

If there is no regular particular estate the grant is void. And when the freehold is created it must vest immediately either in possession or remainder.

The reasons are 1st That livery of seisin is necessary to pass a freehold. And this can only operate instantaneously.

5 B. 94.
Decree 234.
2 Hyl. C. 165.

But besides this there must always, where there is to be an estate of inheritance at L., be a tenant to the receipt, for otherwise there could no real action brought by the real owner of the land. For this action will lie only against the tenant to the freehold. And were the estate to be granted by a person not the owner to commence twenty years hence, the real owner could not bring his action till the expiration of that time.

There is an exception to this rule in case of a freehold rent granted de novo. For here neither of the former reasons exist, for there can be no livery of seisin, and in the supposition there can be no prior owner of the rent.

2 Inst. 204.
Belm. 29.
Hend. 150.
1 Lev. 144.
Salk. 54.

But if one has already a freehold rent he cannot pass a freehold in it to commence in futuro. For here some other owner may have a claim.

Real Property

Estate in Remainder.

A vested estate or interest is one in which there is a present fixed right of present or future enjoyment. Thus if an estate is granted to A & his heirs, there is a present fixed right of present enjoyment. But in a remainder there is a present fixed right of future enjoyment. In the former case the estate is vested in possession. In the latter the estate is vested in interest.

On the other hand a contingent estate is one which is to accrue upon some future contingent event. As if the estate be limited to A & remainder to B, when he returns from sea. Here if B never returns the estate in remainder never vests.

The object of preventing a freehold from commencing in futuro is to prevent the freehold from being in abeyance. The fact that there can be no livery of seisin tends to commence is a sufficient reason for the rule.

Reasons are not allowed because 1st they tended to fetter the estate of freehold and prevent its alienation.

2^d The real owner could not bring a real action.

3^d The lord would be deprived of his feudal services during the time the freehold was in abeyance.

Estate in Remainder.

The meaning of this rule as applied to estates in remainder is that a freehold should pass from the grantor at the time of the conveyance made. The freehold of remainder ^{itself} must pass, provided there is a particular estate of freehold precedent to the remainder, which does pass at the time. And this is evident because in contingent freehold remainder

Lease 1. 2.

24.

2 Wds 233

234.

2 Wils 56

2 Bl C 302.

Real Property

Estates in Remainder
the freehold never does pass at the time of creating the particular
or estate.

It is true that one great reason why there ^{freehold} ~~precedent~~
estates cannot be created to commence in futuro has ceased viz
that real actions are now out of use. So feoffment by livery
is not necessary to be actually made in point of fact, tho'
it is still necessary in point of law.

Suppose a grant to A for years remainder to B in
fee. Here the freehold is in the remainder paper at the time.
For the interest is vested. But were the remainder to the
unborn son of B, this remainder is void. For the remainder
man is not in esse & so cannot take the freehold in present
& the ~~precedent~~ estate is a chattel interest. But were the pre-
cedent estate a freehold the rule would be different, and
the remainder good.

2 Bl. 516-9.

A lease it will, will not support any
remainder For this is thought to be no slender an estate as
not to be a part of the inheritance. But a chattel interest
after this estate is gone but not as a remainder.

8 B. 5
Dyer 18
151

If the particular estate be void in its
creation the remainder intended to be limited must fail. For
here is no particular estate and without this there can be
no remainder. As if an estate be given to the unborn son of
A for life remainder to B in fee, here no freehold passes to B.
But were the remainder to B for years that would be good
as a chattel interest to commence in futuro, but not as
a remainder.

1 Inst. 298.
2 Roll 415.

Estates in Remainder.

2 Bl. 414.
2 Wils. 179

But were the devise to a person not an *ipse* for life remainder in fee to another, the latter would take his fee as an *executory* devise but not as a remainder.

2 Bl. 610.
2 Wils. 80.
6 Wils. 235.

209.
{ 2 Bl. 414.
2 Bl. 61.

And if the particular estate, tho' good in its creation is defeated afterwards, and before the remainder can vest in possession the remainder must fail. So if an estate be limited to A for life or condition, & remainder to B, if the contingency happens before A's death B's remainder is defeated. But if the estate be to A for life remainder to B in fee & A forfeits his estate B's remainder takes effect immediately.

2 Wils. 180.

2 Bl. 3. 109.

85. 150.

The rule above, then does not apply generally to *vested* remainders tho' it does hold where the grantor enters for a condition *in re*. For as the remainder depends upon the *liv*ery of seisin made to the particular tenant, if that *liv*er is defeated by the grantor's entering for a *re* of condition the estate must fail. But the original *liv*ery of seisin can be defeated in other ways, & as in no other case will a *vested* remainder be destroyed by defeating the particular estate.

2 Bl. 3071.

Wils. 25.

1 Wils. 249.

3 Wils. 242. 8.

2 Wils. 177.

A remainder must commence or pass out of the grantor at the time of creating the particular estate. This tho' the rule of the books is not correct. For then there could be no contingent remainder. For this remainder does not certainly pass at that time. Thus much is true, the absolute or contingent right of the remainder man must be created at the time of creating the particular estate. In *vested* remainders the rule above, laid down in the books is correct. But suppose the estate to be granted to A for life remainder to B when he returns from sea. Now here it is clear, the remainder does

Estates in Remainder

not pass at that time. A contingent remainder is created at that time; but whether that right will ever be vested is uncertain.

It was formerly thought that the remainder passed out of the grantor, but did not vest in the grantee.

Then the remainder would be in abeyance. And it is now settled that the remainder remains in the grantor till the contingency happens. And if the grantor dies before the contingency happens the remainder passes to the heir subject to the same contingency as it was in the hands of the grantor.

Coart 262.
Ferne 205.
275. 85. 6.
267. }

Another rule is that an estate in remainder cannot be limited on an estate already in esse. The meaning is not

that when a particular estate has been created, the grantor cannot convey his residuary interest; but he cannot create

Ferne 228.
240. 155.

it as a remainder. If A has granted an estate to B for 20 years he may grant an estate for 20 years to C to commence after the termination of B's estate. Indeed the remainder must be created by the same deed as the particular estate.

3^d The remainder must vest in the grantee during the continuance of the particular estate or at the instant of its termination. So the two estates constitute

one fee simple, they must both be in existence at the same time. If the remainder is a freehold, were this rule not observed, the freehold would be in abeyance during the interval between the estate. And in all cases this must be

the rule or the remainder would not be right to be the particular estate. The meaning however is that the estate must vest in interest. It is not necessary that it should vest in

Ferne 233.
to 240.
Now on 225.

What is the rule?

Remainder

Case 20.
1608. 135
32nd 21
24th 175
to 181

possessor. If the estate be to A for life remainder to B in fee, B's estate is vested at the time, tho' not in possession. But by an estate being vested unless other words are super added it is always understood to be vested in interest only. But if the estate be to A for life remainder to the unborn son of B, the remainder vests in interest at the time of the birth of B's son but not at the time of the creation of the particular estate. But it does not vest in possession until B's death. If the estate be to A & B for their joint lives remainder to the survivor. Here the remainder vests in interest & possession the moment one of them dies. And before that the remainder is not vested.

Again if the estate be limited to A for life remainder to the unborn son of B, & A dies before the son born, here the remainder is gone forever. For there is no one in whom the remainder can vest at A's death.

Case 235. 4.

If the estate be to A for life remainder to B on some future event, the remainder is void in it's creation.

On this third general rule the doctrine of contingent remainders is principally founded.

24th 108.

Case or D 328

Page 1.

Remainders are vested or contingent. A vested is one by which a present interest passes to the remainder man, but to be enjoyed in futuro. This is a present fixed right of future enjoyment. As if an estate be limited to A for life remainder to B in fee.

24th 20.

Page 228.

Page 301.

A contingent remainder is one by which no present interest passes to the remainder man, but which is to vest in interest, upon some contingent or uncertain event.

Estates in Remainder.

If it were vested in interest it would be a vested remainder - 2 Bl 1912.
 and if the estate be to A for life, remainder to B if he be George 233.
 turns during A's life from beyond the sea, this is a contingent remainder 2 Bl B 109, 110.
 and remainder. For here is no vested interest. 2 B 3, 4.

And by the ancient C.L. if an estate were limited to A for life remainder to his first-born son, if A died leaving only a posthumous son the remainder ^{vested} on the principle of the last rule. 2 Bl 288.

A remainder limited to one not in life must be to one ~~in~~ who may, by common probability, be in life at the time of the termination of the particular estate. And if there is not this common probability, the remainder is void at once; and even should the remainder man come in being before the termination of the particular estate he could not take.

If then the estate be to A for life remainder to the heir of B, B being alive. This too is a contingent remainder 2 B 51.
 as yet. For it is not a remote probability that B will die before A, & then there will be some one to take the remainder when the particular estate terminates. Here the word heir is used as a word of purchase and not of limitation. 1 Inst 264.
 It can be taken by inheritance. 373 }

But if the estate be limited to A for life remainder to the unborn son of B, B himself being at the time certain, the remainder is void at its creation. This is a remote probability that B himself shall be born, & have a son before A dies. This is a probability upon a probability & too remote. 2 Bl B 192.
 Holt 55.
 1 Inst 254.
 182~ }

Near Property
 Estates in Remainder.

Gr. 177.

2 C. 51.

2 Bl. C. 170.

Upon the same principle a remainder to Thomas the unborn son of A is void; for that A should have a son & call him Thomas is too remote a probability.

En Ch. 509.

2 C. 51.

How. 32.

2. 175. 178.

2 Bl. C. 170.

A remainder limited upon the happening of any thing unlawful is void; This the test writers consider a remote probability & the theory is perhaps well enough. So then the estate be to A remainder to the unborn illegitimate son of B. it is void. However the probability is, I take it to be a sufficient reason of the rule, that the policy of the law will not allow a remainder to be thus limited.

2 Bl. C. 171.

2 C. 130.

2 Kn. 151.

2 W. 199

And a contingent remainder of freehold can never be limited on an estate less than freehold. For a freehold must pass out of the grantor at the creation of the particular estate. If the remainder be a vested one, it may be limited on a chattel interest.

Suppose then the estate be limited to A for years remainder to the unborn son of B. this remainder is void. For otherwise during the continuance of the particular estate, before the birth of the son, the freehold would be in abeyance, & so there would be no tenant to the precipe.

1 C. 66. 135.

2 Lev. 39.

2 241. 8.

2 22. 2.

62. 70. 2.

Contingent remainders may be defeated by determining the particular estate before the contingency happens. For here the remainder cannot vest at the time or before the termination of the particular estate.

And a contingent remainder may upon the same principle be defeated by a line limited or common recon-

Rest of page

Butcher's Remains

ing suffered by the tenant of the particular estate before the contingency happens.

And the rule is the same tho' the particular tenant suffers a recovery to himself. For here he is in possession of another estate.

2 Bl. 171.
Salk. 224.
1 E. 66.
Co. Eliz. 630.

A vested remainder cannot be thus barred. 2 Wils. 180. 7

But tho' the termination of the particular tenant's estate affects the remainder, yet the mere determination of his action given does not defeat the remainder. If the particular tenant retains the right of entry he is tenant to the precise. Suppose the estate limited to A for life and remainder on contingency to B. if A is deprived & dies yet B has his remainder if the contingency happens prior to A's death.

6 B. 66. 4.
2 Wils. 196. 199.
12 Mils. 174.
D. Ka. 310.

From the last rule arose the necessity of trustees to preserve the contingent remainder. This rule arose during the time of the civil wars in Eng. between the houses of York & Lancaster. And by these trustees, the forfeitures of particular tenants were prevented from forfeiting the remainder. The mode is this the estate is limited to A for life, remainder to B. C & D so during the life of A to preserve contingent remainders, & then remainder to the real remainder man. & then if forfeited his estate the remainder vests in the trustees during his life.

1 Inst. 378.
Hob. 33.
2 Bl. 171. 2.
5 E. 51.
1 Wes. 142.
2 Wils. 246.
540. 577.
D. 84. 95.
120. 152.

The question whether a remainder is vested or contingent; depends upon the nature of the limitation & not upon the probability, or improbability of its enjoyment.

D. 149.
2 Wils. 92.
Hob. 90. 1.

Rem. B. 1885

Estate in Remainder

27 N 488. a.
(2 Wds 184
(185. 192

or vesting in possession. It is then the uncertainty whether the remainder ever will vest in interest that makes the remainder contingent.

A criterion is necessary to enable us to apply this rule. The present capacity of taking the remainder if the proposition were now vacant universally distinguish a vested from a contingent remainder. If it can be taken thus, when the question arises, then the estate in remainder is vested. But if the estate could not be thus taken then the remainder is contingent.

2149.

Cowd 31
Boat 33.
Eyer 303.

If an estate be limited to one with remainder in one went to another - in another went to the other these latter limitations are called cross remainders.

It has been said in the books that cross remainders can be limited to two only. But this is not correct.

Br 185.

4 Bac 333.

Contra

Cowd 780

De 31

4 East 30.

4 C. 416

1 Br 229.

If the cross remainders are to be raised to two by implication the presumption is in favor of them. But if to three or more the presumption is against them. But this presumption in the latter case may be rebutted by positive intention. The reason is that there is in the former case no multiplicity, & in the latter there is. This is the reason of the difference of implication in the two cases. The rule might at first seem arbitrary.

It has been said again that cross remainders can not be raised by dev. This is not law. But they cannot be here raised by implication they must be expressly created. But by will they may be raised by implication.

East 410.

Executory Devises

Real Property

Testator in Power

It has been doubted whether a freehold can be here created by deed to commence in futuro. Our statute provides that no freehold shall be limited either by deed or will, unless to some person in being or the issue of some person in being. This point I believe has not been settled.

There is a species of estate in expectancy not strictly a remainder and it is called an executory devise. It is generally defined to be a devise of a future interest to take effect not upon the testator's death but upon some future contingency. This is not a correct definition. For tho' it does take effect on some future contingency, ~~never~~, this applies also to contingent remainders.

An executory devise is such a limitation of a future interest by will as the law does not admit in C.L. conveyances. This is perhaps the most perfect definition of an Executory Devise.

Now we see in this definition that if such a limitation of a future interest (made by a devise) is such as would be good as a contingent remainder if made by deed, it is still a contingent remainder. And when a future limitation can take effect as a contingent remainder, it is never to be taken as an executory devise.

Executory Devises are allowed out of indulgence to men's last wills. By C.L. no such estates could in any way be created before wills were allowed.

The doctrine of executory devises originated in the time of Queen Elizabeth.

near the only

Executory Devises, vide foregoing page.
 An executory devise differs from a remainder not only in the mode of creation but also in its incidents. As to the mode of its creation it differs in three particulars.
 1st By way of executory devise a freehold may be created to commence in futuro without any antecedent particular estate to support it.

2^d In fee simple way by this upon some contingency be limited after a fee simple.

3^d By way of executory devise, a chattel interest may be limited after a life estate.

But these by &c. are void as limits in deeds.

A contingent limitation is limited by a devise to depend on a preceding freehold capable of supporting it as a remainder & the preceding estate fails before the testator's death, by the death of the first devise, the estate shall take effect as an executory devise.

Suppose the devise is for life, remainder to the first unborn son of A. A dies ~~before~~ during the testator's life. Then the estate to the unborn son of A cannot take effect as a contingent remainder. But it will be good by way of executory devise, as tho' there had been no devise to A. For the devise is ambulatory till the death of the testator, and so the instrument must be construed as tho' there had been no life estate given to A.

1st A freehold may be made to commence in futuro. A limitation then by devise of an estate to B in fee to commence on the day of his marriage is void. So a devise of a freehold to the heir of A when he shall have one is good.

D 305. 300.

{ Power D 238

{ D 250

D 401. 418. 426.

Vallet 44.

Don 225. 430. 431. effect as an executory devise.

Contra

2 no. 128.

184.

Power D 255.

D 308. 304.

1 Ch 153.

Br Ch 878.

Real Property

Executory Devises

But in both these cases such estates by deed would be void. 2^d 598.
 But nothing here you observe paper to the dev- 2^d 226. 227.
 isee as present. The future remains in the donor & his heirs 1st 110. 105.
 till the contingency happens. 2^d 233.

2^d A fee may be limited after a fee by executory
 devise. Thus a man may devise an estate to A and his heirs
 but if he dies before he, then to B & his heirs. This would
 be void by deed. 2^d 343. 410.
 10th 142.

But here the second fee is not to take effect
 after the termination of the other, but it is substituted in
 a certain event in its stead. 2^d 119. 2
 598.
 2^d 227.
 2^d 186. 7
 226.

3^d A remainder may be limited in a chattel
 interest after a life estate. As if A has a term for years
 he may devise a life estate to B remainder to C for years 2^d 119. 2
 86. 95.
 2^d 119. 2

There was formerly a distinction between the
 limitation of the use of a life estate in a chattel interest 2^d 226.
 & remainder over, & the devise of the thing itself & re- 10th 240.
 mainder over. The former were held good & the latter 1st 110. 105.
 not. But now both are held good. 2^d 240.

And a chattel may now be limited to any
 number of persons successively. 2^d 119. 2

But there is a difference between executory
 devise & contingent remainders, when created.

The latter may be barred by a fine or common recovery suffered by the particular tenant. The former cannot. 2^d 213. 8.
 2^d 598.
 2^d 306. 312.

For a contingent remainder must fail if the par- 10th 52.
 ticular estate which supports it goes. But an executory 2^d 221. 227.

Real Property.

Executory Devises.

devise is not dependant on any such particular estate.

If there is a previous estate which would support the remainder ~~and~~ then it is a contingent remainder & not an executory devise.

But it is manifest from the last rule, that

24 7. 7. 15.
2 Bl. C. 174. 5.
12 M. & C. 257.
Pitt 226.

an executory devise creates so far as it is a perpetuity i. e. an estate commencing, until the contingency happens, or means so. But the law will not allow a perpetuity. And since there is a time during the period within which the contingency must happen, to render the devise a valid one. For were the estate given to the 10th in lineal succession from it the ultimate fee would for nine generations be unalienable.

An executory devise must therefore to be so be so limited as to take effect within the life or time in being and 21 years and a fraction of a year afterwards.

{ 3. 314. 20.
256
1. 595
166
Caldt 428.

So an estate may be limited to the youngest son of A who is not yet born. The 21 years are allowed so as to suffer a man to name his property so that the object of his bounty may not have it 'till he arrives at years of discretion. So an estate may be limited to the unborn son of A when he arrives at 21.

It is laid down differently by Bl & some others with respect to the remainder in a chattel interest.

Executory Devise.

An estate limited to A and if he dies without issue to another, this gives him an estate tail.

On the other hand a devise is made to A and his heirs or if he dies without heirs, living B. The limitation is good of a remainder over to B is good. For the contingency must happen if at all during a life in being. Thus to A and his heirs, and if he leaves no issue at his death, to B or his heirs, such limitation is good. The contingency necessarily happening if at all in the specified time. To A for life & if he dies without issue to B to B. is a good limitation, being within the time specifying the period within which the contingency must occur.

It is not to be understood that every limitation with a general failure of issue is void, but it is alive, & is like with an executory devise & must necessarily be good with regard to chattel interest.

Our former mistake was once decided, that if A dies without issue, the estate is referable to the time of the testator's death. But this is not to be considered as a general rule of law.

Any limitation of a future estate whether by executory devise or remainder leading to a perpetuity is void. No limitation can be carried in this way further than the unborn children of some one in life. At this rate the ultimate fee of an estate might be undivisible forever.

3352.

Calh 225.

1 Will 207.

3 A. R. 282.

{ 1 P. W. 432.

{ 3 D. 288.

{ 3 D. R. 120.

{ 7 D. 222.

{ 8 D. 253.

1 D. 140. 141.

1 D. 431.

1 D. 234.

1 D. 23.

1 D. 301. 176.

1 D. 234.

1 D. 392.

1 D. 532.

1 D. 251.

3 A. R. 1532.

5 D. 234.

Executory Devices

It will sometimes give the first unborn devise in an estate tail, rather than defeat the ^{interest of the testator} ~~limit of the testator~~ 2 D. R. 245. 1
254
degree.

When a contingent or other estate is devised over on a condition annexed to a preceding estate, and the preceding estate fails to take effect, the subsequent estate will take effect. It not being intended, the testator that the ultimate limitation should take effect upon the prior limitation.

2 B. & C. 399. 254. 1
4 D. R. 470 478.
1 B. & C. 20.
2 B. & C. 361. 372.
1 B. & C. 273

Salh 227. 230

If a devise is made to A in tail and for want of issue to B, and A dies during the life of the testator, B may take possession immediately. It may be a remainder and takes effect instantly.

Doug 220.
Plowd 340
Gro. Eliza 422.
2 Vern. 722.

But this rule accelerating a second contingent limitation cannot obtain, if the previous estate fails from the remoteness of the contingency.

2 D. R. 251. }
245 }
2 B. & C. 202.
1 Ves 134.
Dr 217. 410.

Rested remainders are descendible, devisable, transmissible, and assignable. They may pass from person to another while they continue remainders, being vested in interest tho' not in possession. It is transmissible that is it will pass when owner's property, to the personal representatives. And lastly it may be conveyed by deed.

2 Wils 159
219

But as the law now stands the same rule is extended to contingent ~~remainders~~ interests, except that they are assignable only in equity, not in law.

Prosecutor General

These contingent interests are usually denominated probabilities, clothed with ~~an~~ interest.

And such a contingent interest upon a second, does not necessarily vest in him who is to bear ^{it} at the death of the remainder man, but in him who is the heir at the time the contingency happens. As if the estate be limited to A for life

After before the younger Kanner's leave two sons the oldest
at some distance he looked for him after the one under in the street
regards me as at my own the youngest of a different father the 18th cen-
tury the father has the contrary to give the subject will take me around.

Let the line rules above given, suppose that the interest became zero, before the contingency happened.

An agreement or receipt such as interest is required
in a lot of leg. but not in a lot of Law. The reason is
that in Law a man cannot sell that which he has
not in possession.

An agreement in a sale, by a contradic-
tingued from a sale or agreement in law, is neither
more or less than an agreement to sell or a sale.

By then there is a grant of an ecclesiastical doctrine in law it is said, but the lot of equity considering it, an agreement to sell or assign, they will enforce it the party making it to make the transfer. The law will not enforce the agreement unless for a valuable ^{or good} consideration.

A contingent remainder or executory devise, then, cannot be transferred at Law in fee, because at Law a grant must always be of a present interest.

Apr 6 152

26th 187.

Nov 24 22

Novbr 182.

12 1/2
922

Executory Devises

A Trust by way of contingent remainder, or executory devise, may be conveyed at law by a fine or recovery, which serve as an estoppel. The record stops him from claiming any thing against the record, and would not allow him to claim it as a future interest, but to bring the interest case before the court would be to deny the record. But an executory devise cannot be barred by a fine levied or recovery suffered, by one having a present interest in the subject, but a contingent remainder can be barred by a fine or recovery by the particular tenant.

2 Wms 12
238. 188
157
Br. 593.
H. 310. 313.

But this contingent interest can not be conveyed, transferred, or sold at law, yet they may be released to the owner of the land. The release is not strictly a sale, but an abandonment of the right. A man refusing to accept a future interest is not conveying it.

1 Doug 411.
2 Wms 218.
11 Mod 152.

In case of Events happening after the testator's death a contingent remainder may become an executory devise where the limitation is upon a double contingency. Where there is a limitation, which is one event which ^{must happen} might have taken as a contingent remainder but which it may be another which has happened or construed as an executory devise.

Dough 471.
476.
2 Wms 244.
2 Bl. 680.

The reason of this rule is manifest. The limitation would take effect as a contingent remainder but effect as an executory devise by the very terms of the limitation.

Real Property.

Executory Devises

Estate in Reversion.

The first limitation in a will, is an executory devise those that follow it are so of course.

739.

2 Bl 249

But there is this rule that when the first executory devise vests in possession the others vest in interest but Mr C. thinks this rule cannot apply to limitations which depend upon events that have not happened when the first limitation vests in possession.

All estates in expectancy are divisible into remainders & reversions.

Estate in Reversion.

1 Burr 228.

2 Burr 172.

2 Bl 145.

An estate in reversion is the residue of the estate remaining in the grantor to commence in possession, after the determination of some particular estate which he has granted away.

2 Bl 155

2 Burr 172

173

3 Lev 406. 407.

The reversion is said to vest in the grantor without any reservation. This seems an incorrect expression, as it would seem to imply the vesting of a new interest, it would be more proper to say remains since it was before vested.

H. A.

A remainder can be created only by the act of the parties, a reversion arises only from the operation of Law.

2 Bl 145

A vested reversion is like a vested remainder is an estate in present, this to be vested in possession in futuro, and therefore transferrable.

But a contingent reversion is not a property at law but probable, it is in equity.

Estate in Reversion.

But a contingent reversion, Mr G thinks is descendible, devisable & transmissible, he concludes so from analogy.

If one grants an estate for years for life with remainder to himself, &c. what he thus limits to himself as a remainder would be the same at Law, without such limitation. It is not a remainder but a reversion.

Bro 321

3 Lev 208

409

2 Wds 177.

2 Bl 176.

And also if he limits to A for life, and reversion to B, this tho' called a reversion is a remainder and must enure as such.

When rent is reserved upon a lease, &c. companies the reversion in a general grant of the reversion, altho' nothing be said of the rent.

1 Inst 144

2 Bl 174, 175.

But rent is not inseparably incident to the reversion. By special words the reversion may be granted without the rent, or the rent without the reversion. But a general grant of the reversion will carry the rent, tho a general grant ^{of the rent} will not carry the reversion. The reversion is the principal the rent the incident.

1 Inst 151, 152

2 Bl 176

If one makes a lease of land he can not ~~make~~ ^{transfer the} a reversion until the lease enters. This rule is founded upon the Common Law doctrine of attornment. But since the necessity of attornment has ceased, it being formerly necessary to grant a reversion, it is reasonable to suppose that the rule is also abolished. The doctrine of Attornment is wholly unknown in Con. and probably in the adjoining states.

315

1 Inst 40 M

2 Bl 176, 177.

2 Bl 172.

288. 290.

2 Wds 177.

174.

Estate in Reversion.

10 B. 109
 Plowd. 483.
 2 Wds 174.

The most proper word for a transfer of a reversion, is reversion, but it may pass under the general word land, if the person describe such subject in which he has only a reversionary interest. ~~in deed of attornment.~~

Independently of the statute of frauds and perjuries as a rule of common law, a freehold reversion could not be transferred, but by a fine or recovery, or by deed and attornment.

Lathe dec 67
 2 Wds 174.
 Park dec 61.

But a reversion for years might be granted at law.

Lathe dec 567
 2 Wds 174
 no.

But tho' at l^y a grant of a reversion was not valid without an attornment, a devise was made good ^{without it} even before the statute 11 G² & of Ann. Attornment was necessary only when livery of seisin was necessary to convey the freehold. But a freehold may pass by devise without livery of seisin, and therefore a reversion may without attornment.

2 Wds 175-177.

As a whole reversion may be granted a way so it may be divided, still leaving the ultimate reversion in the grantor.

2 Wds 177.
 3 Wds 154-155

There may be a reversion of a chattel real as of a freehold interest.

There may also exist a right analogous to this in a personal chattel. This however is never called a reversion. There may be a reversion expectant upon a fee tail.

Estates in Reversion

There may be a reversion expectant on a fee tail, but the law considers this interest so remote that it is of no value, and is not applied as up to in the hand of the heir.

It is a general rule that where a life and greater estate meet in the same person the life estate is annihilated or merged in the greater. The legal notion is that the life estate in these cases is surrendered. 3 Lons 437. Gro Elly 302. 2 Bl 177. 178

But this merger can never take place where there is an intervening particular estate. Nor can this merger take place unless the greater and life estate vest in the person in one and the same right. For if one has the greater estate in his own right and the life in that of another, a merger would be the destruction of the life estate to the detriment of a third person. And if a person has an estate in his own right and another in right of his wife there is no merger. Plowd 418. 1 Inst 275. 2 Bl 177.

It is a general rule that no merger will take effect, to injure a third person for in fictitious juris consistit equitas.

There is an exception to the general rule of merger, where an estate tail &c. meet in one by the same right. The artificial reason is that the merger is considered as implying a surrender, but a tenant in tail cannot make a surrender to defeat his heirs. But a stronger reason is that to allow a merger would defeat the donor's intention, for the issue cannot be barred in tail except by fine or recovery, and the issue shall not be deprived of the chance of not having their ancestor defeat their right. 2 Bl 1. } 8 D 94 } Br Elly 302

End of Estates in Expectancy.

Real Property

Estates in Severally. 2

Joint tenancy.

Lecture 12thJune 3^d 1818.

Copropancy

~~Estates in joint tenancy~~

Common

Under former titles estates have been considered with regard to the ^{of interest} quantity, ^{time of enjoyment} they are now to be considered with reference to the number of the tenants.

2 Bl 179

2 Wils 112. 113

An estate owned in severally is one of which is only one owner during the continuance of his interest. And every estate is to be regarded as one in severally unless otherwise expressed.

2 Wils 124.

Littl dec 277

2 Bacon 188.

2 Bl 180

2 Wils 121

An estate in joint tenancy is one that is granted to two or more, and may, in for life, fee simple, fee tail, for years or at will. This estate it is to be observed is always created by purchase, and therefore always said to be granted. It is created in the most extensive sense of the word purchase, that is that it cannot be created by descent or any act of law. When created it may be descendible but can never be created by descent.

2 Bl 180. 190

Littl dec 295

When an estate is conveyed to two or more, without words regularly making a joint tenancy, it will take effect as such. Thus if land is given to A & B and their heirs they take as joint tenants, there being no words to the contrary. But if one moiety is given to one and the other to the other they will not take as joint tenants.

The properties of a joint tenancy are derived from its unity which is fourfold. The interest, title, time & possession. Joint tenants then have the same interest, ^{commonly from the same time} ^{and} accruing by one & the same conveyance, ~~time~~

joint Tenancy.

~~and held by an undivided person.~~

2 Bl 150.
2 Wils 128.
129.
2d R 511.
312

The meaning of the rule as to the unity of interest is that, Each joint tenant must have an equal quantity of interest. If an estate in one right is connected in possession, and an estate in the same subject ^{to the coparcenary} is not a joint estate.

Little Dec 277
1 Prot. 185.
194.
2 Wils 127.

If a grant is made to A & B for their lives they are joint tenants of the feehold, and each of them has an estate in the whole for the life of his companion & for his own life. But the ~~last~~ ^{first} part of this rule has an incorrect meaning, for he who dies first cannot be said to have an estate for the life of his companion, tho' the survivor has an estate for the life of his companion and his own. It would be more correct to say, That each of the two has an estate for their joint lives and the survivor for the joint lives & his own.

2 Bl 181
187

If an estate is given to A & B and their heirs they are tenants in joint tenancy in fee, the entire inheritance survives to the heirs of the last survivor.

Little Dec 250
2 Bl 187.

If a grant is made to A & B for their lives and to the heirs of A, They are joint tenants for their joint lives and A holds the fee in reversion.

2 Bl 181.
L Sec 235.
2 Wils 127.

If a grant is made to two men & the heirs of their bodies, they have a joint estate for life.

Real Property

Joint Tenancy.

But from the necessity of the case they have several inheritances. The rule is the same if an estate is limited to a man and woman who cannot intermarry. So also of two women.

2 Wils. 126.

127.

Little Dec 283.

In all these cases on the death of the original tenants the issue of each will have a moiety.

1 Wms 142.

Little Dec 283.

Part of an estate tail is limited to a man and woman, who may lawfully intermarry, it is a joint estate tail and the entire inheritance will go to the heir of the survivor.

Title.

Ex R 311
312

2 Wms 128

129

Little Dec 277

The estate of joint tenants must be created by one and the same act as by the same conveyance devise or sc. If the estate of both does not commence in the same act they will have different titles.

Time

The estate of all the tenants must commence at one and the same time.

2 Wils. 129

128 55.

1 Wms 138.

2 Wms 131.

If a remainder is limited to the heirs of A & B and they do not die at the same time tho' they have one and the same interest they are not joint tenants, since their interest does not commence at the same time. But in the such cases they may take as tenants in common but not in joint tenancy.

It seems however that two or more persons may hold a use as joint tenants tho' it vests at different times.

Joint Tenancy.

Thus if it is to the use of A and his future wife, when he marries, the use arises in her favor, and has relation to the giftment before marriage.

1 Br. 101.

13 A. 56.

2 Bl. 151. 152.

Proprietor

Joint tenants are seized by the half and the Little P. 100.
whole. ^{Each is} seized of an undivided moiety of the whole. 5 B. 10.

One consequence of this is that one joint tenant cannot dispossess the other, because each is seized of the whole, but one may release to the other, but a giftment of one to the other is never considered as a release. 2 Wils. 130. 2 Bl. 152.

Where a conveyance is made to husband and wife, they are not strictly joint tenants, nor tenants in common; there is a more strict unity of interest & possession than between joint tenants. Being considered as such in this as many other respects, they are considered as taking by the whole, not by moiety. Hence the husband cannot during the wife's life dispose of all or any part thereof, of his own act. The whole must then remain to the survivor, unless conveyed away by gift or recovery, in which the wife must also be named. 2 Br. 190. 2 Wils. 130. 2 Bl. 152. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Where a conveyance is made to husband and wife, they are not strictly joint tenants, nor tenants in common; there is a more strict unity of interest & possession than between joint tenants. Being considered as such in this as many other respects, they are considered as taking by the whole, not by moiety. Hence the husband cannot during the wife's life dispose of all or any part thereof, of his own act. The whole must then remain to the survivor, unless conveyed away by gift or recovery, in which the wife must also be named. This last rule does not hold only except as to joint chattels, it does not hold as to choses in action or realty. The rule as to personal is very different and applied to real. If a personal chattel is given to husband and wife it vests immediately in the husband.

Little P. 291.
665.

2 Lev. 39.

1 Inst. 187.

227 B.

Perk. S. 223.

2 Bl. 182.

5 D. R. 654.

2 Wils. 128.

Real Property.
Joint Tenancy.

1 Hob 240. A wife is not entitled to dower in an estate held in joint tenancy by her husband with another. It has been thought to have been that the husband might in case of joint tenancy of the wife with another be tenant in dower. But reason & law appear to contradict this. The surviving joint tenant has a prior right to dower of them.

Upon this unity of possession depend the principal incidents to joint tenancy.

The incident is that acts done by or to one joint tenant as such, are generally operative as to both. If both make a verbal lease reserving rent to one only, it will enure to both the reversion being to both. But if by deed the rent I think would accrue to the one. Because the reversion may be enured to one by ~~written~~ deed.

100a
2 Will 130
{ 1 Inst 214
192
2 Bl 182.

Hence too in the creation of the joint tenancy being of seisin made to one of the joint tenants, is the same as to both. For the possession of one is the possession of both.

If two joint tenants are disseised, a recovery by one, is the same as by both, and in legal construction has the effect of both.

By reason of this unity all actions by ^{of joint property} relating to the joint estate, must be brought by or against them, must be ~~by~~ or against them jointly.

Hob 120.
{ Inst 49.
19. 364
Car 328
2 Bacon 216
Inst 180. 195.
182.

Joint Tenancy.

It has been determined in *Bow*: that one of two joint tenants may sue alone. This opinion Mr G. thinks altogether incorrect not only as a violation of the rule, but may cause a multiplicity of suits. To mention many other great objections.

By reason of this unity, one joint tenant cannot maintain an action *quare clausum fregit* against the other, for each has a right to enter upon & occupy each particular part. —

One of the tenants cannot do any act which shall have the effect of defeating the estate of the other. One cannot alienate the part of another, nor alienate the whole so as to oust the other. But now by the statute Westminster 2^d.

one tenant may maintain an action for waste against the other. 2 *Ms* 402.

One joint tenant by committing the other his trespass may have an action of account if the profits.

But at l^t one joint tenant is not accountable to the other for having received more than his share. But now by the statute 20 Geo 3rd one can call the other to account as a joint tenant. 1 *Ms* 200. 2 *Bl* 153. 2 *W* 156.

Upon the unity of interest and possession depends the grand incident to joint tenancy the *jus accrescendi* - the right of the survivor to the whole interest after the death of his companion or companions. 2 *Bl* 157-4.

The rule is the same whether the tenancy is in fee, for life or for years. 2 *Bl* 150-1. 2 *W* 125.

Joint Tenancy.

This right of survivorship is founded upon the reason, that as the ^{original interest} right of each is founded is the same and extends to all and every part, and as the interest does not fail at the death of his companion he has a better claim upon the whole, than any one else has to a part.

3 B 209-10

LHL 8255

1 Inst 154 B.

This right of survivorship is superior to the claim of creditors, ^{unless, especially, is made both before the right is made.} with the exception that

And the rules now laid down as to the right of survivorship and the priority of that right, hold to chattels personal as well as lands tenements &c

But this rule does not extend to joint stock in trade, there is no survivorship in joint merchants.

LHL 8255

1 Inst 152 A

10 Inst 2049

120. 146.

294-305

11 E 3 B.

1 Inst 217.

18 Inst 17

116. 132

1 Ver 242

252

Comp 246

812

1 Ver 217.

1 Inst 152.

2 B 399.

1 Inst 146

Tucker 85

2 Leo 12.

2 B 152

This is so provided by the M & as useful to the encouragement of trade

Partners in trade are not to all purposes joint tenants, tho' they are with the exception of the jus accrescendi, to most purposes, they have a joint interest.

There is also another exception to the right of survivorship, in the case of stock upon a farm occupied jointly, for the encouragement of husbandry.

Neither the king nor any other corporation can be joint tenant with a private person.

The reason assigned is that the private person has no chance of survivorship, which ought to be mutual. But this is not the ^{correct} reason.

Real Property

Joint Tenancy.

Two corporations cannot be joint tenants with each other; so that the reason last given will not apply here since there is here no want of mutualit.

Butt 298.
2 Wils 120

Besides the law does not require that there should be an equal chance of survivorship.

1 Inst 151, 247.
2 Wils 126

~~incorp~~ The reason cannot be that the chance of survivorship is not equal

But the true reason is that the right to hold an estate with another is wholly foreign to the purpose for which a body corporate was established.

This right of survivorship is not essential to the existence or to the exercise of the powers of such bodies politic. And they cannot give out a express delegation of power over, when taken such rights, as are essential to their existence or to the exercise of their corporate powers.

This right of survivorship has in Eng. been exploded in all cases. Joint tenancies as they are held and called in Eng. are as species of anomalous estates. 1 Root 48

As a joint tenancy depends upon the unity none mentioned, it may be destroyed, by the destruction of either of these unities.

Unity of time can never from the nature of the case be destroyed, but the others may be.

Unity of portion may, for if two joint tenants make a division they hold in severall; & the joint tenancy is destroyed.

Joint Tenancy.

{ 292
292
258.
255.

{ vide 5 Burr
1805

But one joint tenant could not compel the other to a partition. But now by statute 31.32 Geo. 3 one can compel the other to divide. So also in Con.

And by the Con statute, the guardians may make partition for these minor joint tenants.

In Con. the demand must be for the proportion in quantity but for value taking quantity and quality together.

{ 292.

{ 130.

{ 186

{ 286.

{ 24.

{ 254.

{ 154.

{ 185.

A joint tenancy may be also destroyed by destroying the unity of title. As if one convey his title to a ^{another} stranger. Still as there is no actual partition, there remains a unity of possession but not of title.

But a devise by one joint tenant does not sever the estate, for the devise will not take effect the survivor will take having a prior right.

Lastly, joint tenancy may be destroyed by the destruction of the unity of interest. Thus if the remainder descends upon one of them, or that case the life estate merges in that which descends and destroys the unity of interest.

If however an estate is granted to two for life as to the heirs of one of them it is a good limitation. Now a limitation to one ^{separately} and for life and to his heirs is one and the same estate, and there is therefore no merger of the life estate. It has a vested inheritance on the death of B. There must be two different estates descending or meeting in the same person to create a merger. Hence the estate for life is not merged in a remainder.

{ 184.

{ 180

{ 182

{ 186

Joint Tenancy.

If one of two joint tenants in fee makes a lease for life to another the joint tenancy is destroyed, the unity of interest being destroyed. *Little v. Blount* 202.3
12th 1918.
192.192

If one of three joint tenants alienates his share the other two hold their parts as before. There is no severance between them, but there is a ^{joint} tenancy in ~~common~~ ^{joint} ~~tenancy~~.

If one releases his part to one of the other two, the other two continue as before as to their respective parts, but not to the part released. *2 Bl 188*
12th 155.

A part of the original joint tenancy may remain so, while another is severed. As to the first part the right of survivorship remains, but not as to the last.

It is generally advantageous to joint tenants to involve the joint tenants ^{for the use of their}, except in case of a joint tenancy for life. For if they sever it, they will hold only an estate in a moiety for life, if they do not. *2 Bl 187*
The survivor may enjoy the whole, and the deceased will have enjoyed as much as if they had severed. *4 Lj 291.*

If two are joint tenants for life and one alienates his share for the life of the other he forfeits his estate and the grantee takes nothing. *1 Inst 252.*
2 Bl 127.

If one joint tenant enfeoffs his companion, the other may recover possession by the action of ejectment. But there must have been an actual ouster, for without it, the tenant in possession is deemed to have and receive for both. And the title of the other is not considered as disputed but by an act of

Coparcenary.

order. But there can be judgment only that he shall be restored not that the other shall be put out.

Coparcenary.

An estate in coparcenary is one that has descended to two or more persons as heirs. The rule of the descent.

1 Hl Lc 241-2 At C & L gives the whole estate to the eldest son, but if
2 Wals 112. a man dies without a son leaving two daughters they
1 Wals 165b. will take as coparceners.

2 Bl 187

2 Wals 122

1 Hl 3263.

By the custom of gavelkind the old rule of descent is taken away, and all the sons take equally.

This preference of sons does not probably exist in any State of the Union, the right of primogeniture does not exist in any one of the States. Mr G. thinks that all the children are equally heirs in all the States.

1 Hl 100

2 Wals 113

118. 117

All these coparceners are considered in law as but one heir.

2 Bl 148

Properties of a tenancy in coparcenary, some-
what resemble those of joint tenancy. It has but
three unities Title ^{interest} and Possession.

1 Hl 162.

188. 252.

2 Wals 117. 118.

Coparceners may sue jointly and the entry of one generally is the entry of all in the view of law; and they may be sued jointly.

7 RR 386.

2 Bl 158.

200. 228

An entry upon an estate by the guardian of an infant parcener, the entry is effectual in favor of all the parceners.

Coparcenary.

In consequence of the unity, one joint tenant in Coparcenary may not maintain an action of trespass against another, for one coparcener can compel a partition of the tenancy. But it was not so at C. L., and ~~there~~ with regard to joint tenancy, and therefore the statute Westminster 2 was enacted for that purpose.

1 Inst 172, a.
2 Inst 155
165.

But parceners differ materially in some respects.

1st Parceners do not claim by descent, and such tenancy can only be created by descent. As a consequence of this severalty from a joint tenancy, no other but estates of inheritance can be held in tenancy in Coparcenary. But it is not so in joint tenancy.

2d Ed 3254.
2 Wols. 112.
116.

But in general whatever may be inherited may be held in coparcenary.

In this species of tenancy no unity of time is necessary. Thus if one parcener dies, the survivor still heir of the deceased take as coparceners.

1 Inst 174.
2 Inst 155.

No coparceners have a moiety they have not like joint tenants an entirety of interest.

Every coparcener each is seized of a whole^{of} distinct moiety, but not a moiety of the whole. Whence there is no jus accrescendi.

1 Inst 155
162

With regard to the mode of descent this rule must be observed. The descent is per capita, that is, if the heirs are ^{related} in equal degree to the ancestor, and ~~also~~ entitled in their own right.

1 Inst 164, a. b.
2 Wols 115.

Cognate

The descent is said to be per capita at distinction distinguished from per stirpes, that is where they all take equally, and not by the right of representation.

Representatives are said to take per stirpes when they take in right of another person or through another person, from a common ancestor.

If a man had two daughters, one of whom had several children who died before him, when he dies, what would have descended to his deceased daughter goes to her children, and the other daughter receives the same as if her sister were living.

Again if they all take in equal degree yet if they claim by right of representation, they take by per stirpes.

Suppose that there are two women, one having four the other only one child, these children claiming by representation, the issue of each will take what the mother would have taken. So that the estate of one mother will go to four children that of the other to one.

In cognate at C. & L. males are preferred to females, as in the case of descent per stirpes the son of a cognate will take in preference to the daughters.

As long as land holds in cognate continues in descent without partition, it is still held in cognate. But if partition has once been made, the cognate is at an end.

{ 162 a.
2 M. 114
115

2 M. 115

Coparcenary.

To abate if one of the original parcellors alienates her share, the coparcenary is destroyed. *Ho. Hen. 20 309*
 is no partition, but there is no unity of title, and *2 W.D. 118*
 it is essential to a coparcenary that it be by descent. *2 Bl. 188-190*

If two coparceners marry and die leaving *1 Inst. 167*
 husbands tenants by curtesy, the husbands do not *2 W.D. 119*
 claim as parcellors but as tenants in ~~common~~ com-
 mon. They cannot claim by inheritance, and
 therefore are not parcellors.

The wife can claim dower where the husband held in coparcenary. *Litt. 24. 2 W.D. 119*

There being no survivorship in coparcenary the objection urged against dower & curtesy is without reason.

Partition may be made in four different ways. *20 54.*

1st They may all agree to the division and that each shall have.

2^d They may appoint a third person to decide for them. *2 Bl. 189*

3^d They may ^{give} make the eldest parcellor the owner, standing with the last choice. *Litt. 24. 2 202*

4th By casting lots. *9 E. 22*

But parcellors may be compelled to make partition. This may be effected by writ of partition *Litt. 24. 1*
 or by a bill in Chancery. *2 W.D. 120*
W.D.

In the right of partition there are two arguments. 1st That there be partition made, and upon this argument, a writ is given to the sheriff. *2 Bl. 189*

Tenancy in Common.

cause partition to be made. And upon the return of the writ the second judgement is given to affirm such partition.

Where there are any incumbrances it is usual to apply to Chancery, for they are beyond the power of the Cts of L.

Where the subject is indivisible, the common practice is for one of the parcers to take the whole giving proper compensation to the other or for all the parcers successively to have and occupy it by turns.

It is common in Con: and generally in N.B., to observe the last rule, where the subject cannot be divided without destruction.

Tenancy in Common.

Tenants in Common are defined by Bl:

to be those who hold by several distinct titles but by unity of possession. But this definition is not altogether correct but it is very difficult to devise a better definition. It is true that all who hold thus are tenants in common, but all tenants in common do not hold thus. From this definition it is to be understood that no other unity is necessary than that of possession. But they may hold by unity of title interest & time, provided that proper words be used to create a tenancy in common and not a joint tenancy.

Tenancy in Common.

But if the interest of all the tenants is one and the same, and the title vests and does commence at the same time and the possession is united, they will be joint tenants, of course, without words are used creating a tenancy in common.

But if there be no other unity than that of possession they are tenants in common.

If a tenancy is common no other unity than that of possession. Hence Lord Coke says tenants in common to be ^{is necessary} whose lands by several titles or by one title and several rights.

Lecture 15.

June 7th 1813.

1 Inst 189^a

3 Bac 180

19th

2 Wils 133.

The tenant in common then may hold in fee and the other in tail or for life. Or one may hold by purchase or deed and the other by descent. The estate of one may commence at one time, and that of the other at another time. Unity of time not being necessary.

2 Bl 192.

Tenancy in common may be created either by such destruction of a joint tenance or coparcenary as does not sever the possession, or by limitation in a deed or devise.

If one of two joint tenants alienates a share. Little 293. 295. 1 Inst 189. 191. 6. 3 Bac 194. 2 Wils 134. Little 309. 2 B 191.

For the same reason if one of two parsoners assigns to a stranger the latter with the other parsoner become tenants in common.

1885.
2 Bl. 145.

Tenancy in Common.

2 Mac 194.

2 Bl. 145.

Wherever a joint-tenancy or coparcenary is destroyed, without a partition, so that the unity of possession remains, it becomes a tenancy in common.

In a limitation of an estate intended to be a tenancy in common, care should be taken that no words be used that would create a joint tenancy.

1895

If A and B or devise there is granted to two or more persons an estate which is not a joint tenancy, it must be a tenancy in common.

2 Bl. 145

The rules of construction in a deed or devise favor a joint tenancy rather than a tenancy in common. For being established in early times, they favor the interest of the feudal lord. For in a tenancy in common the services were divided.

3 Mac 195

2 Bl. 195-2

The most usual and safest way is to limit the estate expressly to A and B as joint or tenants in common. But other modes will answer the same purpose tho' not so good.

1 Bl. 194.

1 Bl. 190.

3 Mac 194.

1 Bl. 190.

1 Bl. 190.

1 Bl. 190.

2 Bl. 190.

Thus if a limitation is made of one half to A and the other to B, it is a tenancy in common, as they take by distinct moieties.

And if a man grants half of his land to a stranger they become tenants in common.

But a deed or devise to two persons to hold jointly & severally creates a joint tenancy.

Tenancy in Common.

An estate devised to two persons to be equal- 3B 39
 ly divided between them is an estate in tenancy in 1 Vent 32.
 common. 2 Do 323.
 355 356.
 2 Roll 90.

And it has been determined that a devise of 3B 63
 lands to A & B equally creates a tenancy in common. 2 Wils 252.
 *It was formerly held however that these 1 G. 2. 292.
 words in a deed would create a joint tenancy, not 2 C. 2. 695.
 in a devise. However in a modern case they have *1 P. W. 11.
 been thought in a deed to create a tenancy in com- 2 Bl 193.
 mon. Com. 11 88.
 3 Bac 195.
 2 D. 622.

Tenancy in common, may exist also in 2 Wils 135.
 estates in freehold, chattels real, & chattels personal. 1 Wils 241.

As between tenants in common there is no 3 B 600
 survivorship. The wife may be entitled to dower and 1 Wils 241.
 husband to curtesy. 2 Wils 135.
 2 Wils 135-6.

So tenants in common have distinct rights 2 Wils 135-6.
 one can convey his right to the other.

One tenant in common could not at C. & L. 2 Bl 194
 compel the other to make partition, but now by statute
 31. 52 Henry 8 he has this power.

But coparceners always could. The probable 3. 1.
 reason of the diversity is that the latter became so
 by operation of law, but joint tenants are volun-
 tary, and take the estate by mutual agreement
one cannot compel a partition.

A very material difference between joint
 tenants & coparceners was the law, and tenants in

Real Property

Tenancy in Common.

2 H Bl 389. common on the other is that the latter cannot join
 2 H Bl 311. in actions ^{relating to} the realty. But if an undivided ~~of~~
 3 Mac 210, 217. thing is holden in common, and to be sued for all
 12 Inst 197^a. ought to join. They can never join except in case of
 2 H Bl 390. receipts their titles being different.

1 Inst 197^b. So also in trespass and all personal actions.
 2 H Bl 194. They should all join for ~~the~~ here the damages
 are ~~undivided~~, in legal contemplation and must
 be recovered at once without apportionment.

2 H Bl 389. Besides otherwise there would be a multi-
 1 Inst 315. plicity of suits.

2 H Bl 210. And in regard to personal actions like
 6. 24. 204. brought by tenants in common, they are quasi joint
 1 Inst 198a. tenants. These personal actions survive to the sur-
 vivor. Thus if during the lives of both a trespass is
 committed, the survivor has the whole right.

If tenants in common make a lease under
 1 Inst 197b. agreement, the reservation will follow the reversion.
 2 H Bl 389. which is in severally. And must make separate
 awards.

If they are deforced they cannot join in an
 1 Show 542. action to recover, for their titles are distinct.

2 Inst 214.

Part 224.

2 Wro 232.

Br 9. 166.

2 H Bl 389.

2 H Bl 389.

2 H Bl 389.

1661.

in ejectment.

They cannot make a joint lease to joint
 tenants or coparceners.

But this rule does not hold with joint ^{Pl 1181}
 tenants or coparceners. ^{Exp Dy 449.}

Tenancy in Common.

It has been determined in *Boon* that joint tenants or commoners, may sue jointly or severally at their option. This is an evident departure from the old and from analogy. & a departure from principle.

But if one tenant in common cannot sue his companion for receiving more than his share of the profits, this is however now remedied by the statute 2 & 3 of Ann, which affords relief.

And by the statute Westm 2 one tenant in common may maintain action of waste against his companion.

If one tenant in common suffers or wastes his companion the latter may have an action of ejectment to recover the possession.

But to entitle him to maintain this action, there must have been an actual ouster, for until he is thus ousted the possession of the other is his also, the possession of one being considered the possession of both.

The sole possession of one and the acceptance of the whole profits is not sufficient to effect an ouster.

But there need not be an actual forcible ouster to maintain this action. For the sole possession of one tenant is not sufficient evidence of ouster, but sole and adverse possession is sufficient evidence of ouster.

If then one retains the whole possession denying the other's title it is sufficient proof of ouster.

1 Inst 42 a
200.199
2 Bl 19 a.

2 Inst 177
185.

Lecture 10
June 8. 1818.

1 Inst 199 b
200 a.
3 Wils 818
1 East 568
2 Bl. 194.

Call 292
Ld Ra 404
137. 250
716.
Str 531.
950.1180.
7 Mod 39

Tenancy in Common.

Comp 212 214.
3 Burr 1895.
Ld R 512.
12 Mod 655.

3 Burr 1895
Pul R P 109
Esp Dig 451

Comp 217

Great length of possession by one, without any account of the profits, is sufficient evidence of tenancy in common.

But the defendant's confession of lease entry and ouster a confessor which he is obliged to make is sufficient to prevent a mesne suit of the plaintiff. The action of ejectment is altogether fictitious, by means which, the last rule will be explained.

The statute of limitations does not run against the tenant out of possession, where the other retains the whole possession, unless the other former has been actually ousted.

The judicial remedies of tenants in common extend only to things real or savouring of the realty.

Where there are tenants in common of lands hereditaments &c they are entitled to the remedies above mentioned of waste account &c.

But in a personal chattel if one keeps him exclusively, the only remedy the other has is to take him as he can, as Lord T says in saying his time.

Sub 323
West 200.
3 Burr 319.

2 Bl 194.

Tenancy in common may be destroyed by partition or uniting all the titles & interests in one of the tenants by purchase or otherwise; and the estate is consequently held in severalty.

Title by Execution.

By the Statute law of Con and many other states the right of an execution has become a common mode of acquiring title to lands.

Writs of execution according to Common Law.

By the Cde the writs of execution in personal actions are these only fieri facias, levari facias, and capias 32 H. 12.
3 H. 2. 14-15.
Com Dig. Exec. C.
1. 2. 3. 9
ad satisfaciendum.

Of the fieri facias.

Upon this execution only the goods & chattels of the defendant can be taken. But by it money may be levied out of chattels real as well as personal. 1 Inst. 290. b.
8 B. 171.
Com Dig. Exec. B.
4.

And when personal property is taken upon this execution, it is to be sold by the officer to satisfy the debt. 3 H. 2. 17.
8 B. 171.
Com Dig. Exec. C.

Levari facias

This extends to goods and the profits of lands so that the sheriff may take under it the growing emblements as well as the goods of the defendant. 3 H. 2. 17.
Blacks. 121.
Com Dig. 2. 4. 2.
2 Bac. Exec. C.
Com Dig. Exec. C.

Under this writ also the sheriff may compell those owing rents to the debtor to pay them over to him. - to satisfy the judgment.

Upon these two executions the whole person as property of the defendant except necessary wearing apparel is liable to be taken at the profit of land. 3 B. 12.
Com Dig. 2. 5. 0.
2 Bac. Exec. C.
3 B. 12.

But on neither can the land be taken.

Nor can fixtures be taken upon either of them as stoves, windows, furnaces in the chimney, fences &c. 1 Roll. 591.
3 B. 12.
Com Dig. Exec. C.

3 East 38 Lalkell 362.

Title by Execution

At C. L., there was no action by which the debtor's lands could be taken, except after his death, while it was in the hands of the heir.

Capias ad Satisfaciendum

This writ issues against the body of the debtor or a tenant only. But by C. L. this writ was allowed only in cases in which the injury was committed by force as trespass &c it was regarded as a penal collecting writ & not an action. Where the party was liable from mere neglect, ~~his~~ his body was not liable at the C. L., but only where there was some breach of the peace.

At C. L. if a party recovers in any other action where ~~some~~ ^{some} ~~was~~ brought one sounding in force of arms, he was obliged to resort to one of the two former executions against the original debtor.

But he was not confined to those in actions against the heir.

But by the statute of Mabb 52 H. 3. Westm. 2. 10. Edw. 1. & 27 Edw. 3. ca 25 Edw. 3.

The last writ of capias was extended to actions not sounding in force.

But this in Eng. the king might have an action against the land, in subject could at C. L.

This rule was a consequence of the feudal restrictions upon alienations.

But upon a judgment to recover against an heir or such, on the obligations of the ancestors, the plaintiffs could come upon all the lands descended

36. 12.

1 Inst 289

290.

{ Com Dig. vol. 83.
(2. 9)

2 Inst.

36. 12.

Parson. 1. 314

36. 12.

36. 38

2 Inst 63.

1 Inst 289. 6.

3 Bl. 18. 19.

Held 441. 2.

36. 11. 12.

2 Inst. 63.

Geo. 1. 115.

Real Property

the execution.

from the ancestors. But gavelkind from the nature of the
 case, and the heir should not be liable for his ancestors
 personally, he has no interest in the personal property,
 if then the lands were not liable, there would be no
 remedy, since he is not the debtor. ~~the person of the heir is not~~

28.2
 Plow 446
 441 note
 Com. Dist. 19
 28.2
 28.3
 28.12

liable; In this execution however against the heir,
 the land is merely extended to be holden by the creditor
 until the profits satisfy the judgment, the fee decs
 101. pass.

Plow 444

Thus much for the execution. But now by
 statute Westminster 2 a plaintiff may have ^{without} ~~an~~ ^{elegit}
 writ ~~against~~ ^{against} the goods & chattels and half the
 value of the defendant.

2 Br 101
 3 Br 413.
 2 Bac 349.

But under this execution the goods are
 not appraised & valued and then delivered into
 the hands of the plaintiff, and to be holden
 by the plaintiff until the profits satisfy the judgment.

Com. Inst. 614.
 2 Br 101.
 2 Bac 349.
 3 Br 413.

And by the statute de mercatoribus and the
 Statute of Edw 5th, two new species of execution are in-
 troduced. These take place upon a forfeiture of mes-
 suerage under the statute, and under either of them
 all the lands & goods & chattels of the defendant are
 liable, but the lands are only extended to the uses alone
 mentioned.

2 Br 100
 2 Br 101
 3 Br 420
 Little Nbr 131.

In law there is but one execution in personal
 actions, and that goes against the lands, goods, and chattels
 of the defendant. By their law, when goods are taken
 in execution, they are to be sold or advertised or sold a

Real Property.

Title by Execution.

sold at public vendue in 20 days.

Stat of Con
280-1
022.

But before the goods can be taken, a demand for money must be made, at the defendants place of abode if that be within the precincts of the sheriffs authority.

If the sheriff sells the goods before or after the time appointed it is illegal, and the sheriff is a trespasser.

Stat of Con
282. S. 4. b.
2 Sheriff 283.

And if personal property sufficient is under the execution cannot be lived upon the land or body of the defendant.

It has been doubted whether specie could be seized. This doubt should arise it cannot well be conceived, however there remains none now, the money can be seized.

3 B. 11.
Doug. 219.
280.
1 Root 216.

Stat of Con
282 S. 4. c.
1 Sheriff 332.
284.

But if sufficient personal property is not tendered, he may take either the land or body of the defendant.

1 Sheriff 333

And if a sheriff without the order of the creditor, takes land when he might have taken the body or personal property, he is liable to the plaintiff for the whole amount.

Lecture 17
June 9. 1878.
Stat of Con 281.
284.
2 Sheriff 282

By the Stat of Con necessary apparel of himself & family necessary bedding & tools, arms, necessary implements of his household, of his bedding, necessary furniture, one cow, sheep not exceeding ten, two swine are exempted from execution. But if there are more than these animals they may be taken. Legally what is taken are tendered may be legally taken.

Title by Execution

After the sheriff has taken the body of the defendant, & before commitment sufficient personal property is tendered he must release the body. 2 Inst 234.

By the law of Eng & if the sheriff after taking upon execution permit the defendant to go at large for one moment upon whatever security he is guilty of, & a volunter escape. 1 Vent 269
2 D.R. 176
3 Bac 240

But it is otherwise in Con.

By the C. L. if the sheriff is doubtful as to owner ship of the goods he may summon a jury to ascertain the fact, and if does not, he seizes or omits to seize them at his own risk. 4 D.R. 633
638
2 D.R. 435

But in Con the sheriff has no such power, but must judge for himself, if there is any ^{reasonable} doubt he is not bound to take it, and consequently not liable for not making the seizure, without sufficient security. 2 Inst 282

If the deft plaintiff present to the sheriff, & not belonging to the defendant, he is liable to the sheriff. 2 Inst 282.

If the officer does not take property sufficient at the first seizure, he may make a second. Bon Dy C. L. }
26.
Bac vol 1.

But if the sheriff seizes on property which is insufficient and can afterward find no more nor the body of the defendant, he is liable to the plaintiff for not taking the body, unless he has been otherwise directed by the court. 1 S. 94
2 Inst. 282.
2 Inst. 282.

Real Property. Title by Execution

These rules suppose that he could previously have found more property or the body of the defendant.

It has been not unusual in Bos: after the an attachment has been issued in execution upon the property of the defendant, that ^{for} another creditor a attach them in the hands of the first. This owner very properly has been also denied by the supreme Ct of Massachusetts.

In such a case see if the sheriff who levied first, after having sold the goods has any surplus it must go to the debtor.

Under the statute of Bos a fee simple may be taken in execution. And not only a messuage but all lands and tenements are liable to execution.

And the mode of selling off of lands &c is the same whether they are held in fee or otherwise.

The statute also has been extended to an equity in redemption, but the only an equity of redemption is not liable to execution.

As to the mode of acquiring title to land by execution, that is settled by statute law.

The sheriff must first make the demand at the house of the defendant if within his precincts. If upon demand thus made the money is not paid nor sufficient property tendered, the sheriff may then levy upon the real estate.

5 Mass. 271

Sho. Bos 132

15

1 Sheriff 132

1 Day 90

2 Day 15

1 Sheriff 334-5

1 Day 90

8 East 467

2 New 2461

Sho. Bos 285

1 Root 241

1 Day 902

2 L 282

Sho. 282

1 Sheriff 332

2 Root 19

Title by Execution

If their real estate is taken, without demand, or after sufficient personal property, or money, tendered the sale is illegal and no title is acquired.

This return and must also appear upon the return of the sheriff, or the levy is not good.

But there is an exception to this rule with regard to all returns made before August 1800. It has been customary to insert the demand in the return of the sheriff.

If land being taken it is next to be appraised by three indifferent freeholders of the town.

A person nearly related to one of the parties is not an indifferent freeholder, as an uncle, nephew &c.

If a feme sole having obtained execution before marriage, after coverture she can appoint an appraiser. This is doubtful.

An appraisal by persons not freeholders is not good. Both parties agreed to it.

One or more appraisers in certain cases must be appointed by the next ablest justice of the peace, that is any one in the town where the land lies.

And to complete the title, the officer must return the execution with his endorsement to the clerk, upon the register of the town in which the land lies, and the office of the clerk of the court whence it issued to be there recorded.

Root 941

St. Con. 204

Do.

1 Supp. 230

Root 221

St. B. 282-3

543

1 Root 190

1 Day 109.

2 Root. 424.

1 Supp. 333.

1 Day 100.

2 Root 115

1 Supp. 230

1 Root 190

1 St. 141.

1 Supp. 230

Stat. 282.

283.

1 Root 1254.

1 Supp. 333.

Title by Execution.

2 Mt 547

1 Mt 289.
547

This recording completes the title, yet a copy of the original judgment may be required in trial.

Recording by the town clerk only, or the clerk of the St only is not sufficient.

1 Mt 521

The whole record ^{of the town clerk} need not be given, in but a certificate from the Town Clerk & a copy of the record of the clerk of the court are sufficient.

The defendant in the execution may defeat the title by tendering, at any time before the execution is returned.

Under the St of Con also the whole interest may be taken, and sold off. There is no provision for extending bonds.

2 Mt 53

1 Mt 190

791

2 Mt 207

1 Do 200

1 Mt 190

1 Do 200-6

1 Mt 283

1 Mt 201

2 Do 201.

1 Mt 161

By the stat of Con, if judgment is had against the defendant out of the state, the plaintiff must give a bond, to refund the property taken if the defendant return within a certain time and set aside the judgment and without such bond the judgment is ~~not~~ erroneous. But only the defendant or his representatives can take advantage of it.

All executions in Con must be made returnable in 60 days, or if there are 60 days from the date to the next term, "at the next term".

If the execution be lined to be "returnable at the next term", ~~it is not returnable~~ it is returnable to the next term of the Court from which it issues, between which & the last there are 60 days.

And a levy made after the return day is void. 1 Hk. 101.

In return if the officer does not return on 3 day. 1.
or before the return day, he is liable to the plaintiff.

But in levy if the judgment has been satisfied talk 518.
no return is necessary. Bon. de C. 1.

But tho' as long after the return day is made, 2 Swift 281.
yet if it be begun before that day it is valid, since
it is a rule that all things executory have a relation
to the first act.

A levy of an execution does not end the action,
but only vests the title in the plaintiff. And the
plaintiff may after bring his action of execution. 2 Hk. 101.

It is a general rule of C. 1. that if the
first execution is ineffectual, that he may
again may by a scire facias ~~take~~ a new execution. 1 Hk. 101.

At C. 1. an execution cannot issue after judg-
ment has been for a year and a day, unless by a scire fa-
cias. 1 Hk. 101.

This scire facias in personal actions was
given by statute, tho' in ^{real} actions by C. 1.
In law there is no time limited to the effect
of an execution's taking effect. 1 Hk. 101.

An execution ^{can} be prayed out only by one who is
party or privy to the judgment, or the plaintiff, his
personal representatives. 1 Hk. 101.

In real actions if the plaintiff dies after
judgment, and before execution, the heir receives the

2 Hk. 101.
3 Hk. 101.
295. 298.
2 Hk. 101.
C. 1.

Com. de Exec.
1 Hk. 101.
5 C. 1. 800.
Hk. 101.
1 Hk. 101.
2 Swift 281.

Com. de Exec.
1 Hk. 101.
1. 5.
Talk 258.
Com. de Exec.
Hk. 101.

2 Swift 281.
Com. de Exec.
Hk. 101.
1. 5.

Real Property. Title by Execution.

Personal property the execution. But in personal actions the execution belongs to the personal representatives.

And if the plaintiff after having obtained execution dies, it may be executed without a *scire facias*, in favor of the heir or personal representatives.

If an administrator durante minority of the executor obtains judgment and the executor attains the full age he will have the execution.

1 Roll 889.
2 Bac & G.
3 Com & G.
4 Mor 521.
5 Lalk 322.
6 1 Roll 888-9
7 2 Bac & G.

2 Bac & G.
Lalk 323
2 Com & G. 1072.
3 Cr 94
4 Lalk 83.84.

As now by the statute, Par 11, if an administrator having obtained judgment ^{leaving execution.} dies, the administrator de bonis non has the execution, tho' it is said he would not a Common Law.

If judgment is given against two and one dies before the execution the plaintiff may have an execution by *scire facias*.

If judgment is had against one only who dies before execution leaving lands in fee simple, execution may be prayed out against the heir by a *scire facias*.

Or if personal property is left, he may obtain execution against the executor or administrator.

But if the writ of execution issues before the defendant's death it may be executed without a *scire facias*.

If judgment is given vs husband & wife & the husband dies before execution it may be against the wife alone.

Bac Baron & G. 4. Lalk 878. 882.

Estate upon Condition

Lecture 8

June 21, 1893.

An estate upon condition is one depending upon some uncertain event, in which it may be created, enlarged or defeated. It is thus distinguished from an absolute estate.

Part 201

2 Bl C 152

There are of two sorts. 1st Estates upon condition implied & 2^d Estates upon condition expressed.

2 Bl C 152

Under the latter class we receive estates implied. Estates upon condition implied are those to which there is some condition annexed from the nature & essence of the estate, and not expressed. These implied conditions interfere with the operation of law.

It is not a condition annexed to every estate that the holder shall do no act incompatible with the nature of it; here there is no need of invention, this condition is the duty or base for the law supplies it.

LHL Sec 415

Part 215

2 Bl C 153.

An estate upon condition expressed is one to which some condition expressed is annexed by which the estate is to commence be enlarged or defeated.

Express conditions are precedent or subsequent. A precedent condition is one which must be performed before the estate can vest or be enlarged. As an estate when A marries or arrives at 21 years.

A condition subsequent is one by which an estate already vested may be defeated. As if an estate is granted to A upon condition of paying an annual sum & if he fails so to do that he shall forfeit the estate.

LHL Sec 425

Part 217

2 Bl C 154.

real property

Estate upon Condition.

1628.
Gr. Cas. 73.
1628.
5 C. 21.
1628. 11.

In this last case the grantor cannot recover the estate unless he demand the rent on the day of payment at C. L.

There is a distinction to be observed between a ^{qualified} condition, & a limitation, called a condition in law. Now such words as "when," "until," &c. are words of limitation; but the words "upon condition," "provided" so that" &c. are words of strict condition as distinguished from those of limitation.

1641
Gr. Cas. 100
1641
1641 155.

~~But from these words the~~

If the qualification is of limitation, upon the happening of the contingency, the estate is defeated without any act of the party.

1641 104;
3 C. 21
1641 155.

But where the estate is limited upon strict condition in deed, the estate does not cease of course from the breach of the condition, but the next claimant must do some act to defeat it.

But this distinction does not hold universally, for if words of strict condition are used & the estate is limited over to a third person, the qualification is called a limitation and not a condition.

1641 202
Gr. Cas. 205.
1641 411.

The reason is, that if the estate was construed upon condition, it could not be defeated by some act of the ~~grantor or his representative~~ ^{grantor or his representative}, but the grantor can have no interest when it is limited over to a third person, and this third person not being party to the contract, & ^{could not} ~~cannot~~ claim for breach or condition.

Estates upon Conditions

Where a lease contains a clause that the lessee may, at any time, for non-payment, so it is not necessary that actual entry be made. The reason is to be found in the fiction of the act of ejectment. Balk 252.
2d Ra 52.
Balk 252.

It was formerly doubted whether a condition annexed to a lease, that the lessee should not assign, was valid, but it is now settled that such condition is good. 2 Atk 219.
2 Bl R. 331.
2 D. R. 381.
8 D. 341.

It was still a later doubt, whether a condition that executors could not assign such interest, but it is now determined that such condition is binding. 2 Atk 219.
2 Bl R. 331.
2 D. R. 381.
8 D. 341.

A condition in a lease that if the lessee becomes a bankrupt, that the estate shall determine against the assignee & creditors.

It seems now to be settled that a condition in a lease that the interest shall not be taken upon execution is good. 2 Atk 219.
2 Bl R. 331.
2 D. R. 381.
8 D. 341.

If one who holds an estate for life or years, attempts to assign, against a condition that he shall not assign, the estate does not determine if not being an assignment.

If an express condition subsequent annexed to an estate is impossible, the estate is determined as if there were no condition.

It seems a general rule that a condition is an impossibility is void ab initio.

Real Property

Estates upon Condition.

2 Bl 615. The rule is the same, if the condition is possible at the creation of the estate, becomes impossible by the act of God or the grantor. *Act Dei nemini facit iniuriam*.

Again if a condition subsequent is a matter of law, or repugnant to the nature of the estate granted, the condition is void, & the estate absolute.

The law will never allow a man to take advantage of an unlawful act.

2 Bl 157. Besides it is also against good policy to make such condition voiding, as it ~~some~~ might induce men to commit crimes.

But if a condition precedent is unlawful or impossible, the estate itself as well as the condition is void from here the vesting of the estate depends upon the performance of the condition. Now one can never by negotiation be performed. And ^{in the other} the performance of an unlawful condition can never confer a right.

1 Bl 205. The performance of a condition is provable by parol evidence.

— 55
Barnardiston 90

1 Bl 205

Now on the 9. 4

2 Bl 157

But 205

2 Bl 157

Under the head of estates defeasible upon a subsequent condition are estates held in pledge. The first sort are called *vincum solum* or *vincum pledge*, i.e. an estate holden by the creditor to discharge the debt he the creditor profits. And when the estate held is thus discharged the estate is upon facts restored.

A pledge of the second kind is called ^{mortgage} ~~mortgage~~ ^{mortgage} or mortgage.

A mortgage is an estate granted by a debtor to his creditor on condition that if the debtor at or before a certain time pays the debt to be the grantor or his heirs or assigns that the creditor shall recover or that the grant shall become void.

Little 202.
Trust 205.
Bowen Mr 2.

This is called a pledge, because upon failure of payment at the day appointed the estate is forever gone from the mortgagor at law without a possibility of recovery.

2 B.C. 158.7.
Br Ch 247. }
249. 4. 50 }
Bowen M }
4. 13. 168 }

A mortgage then is an estate pledged by a debtor to a creditor for the purpose of securing the payment of the debt. The grantor is called the mortgagor the grantee the mortgagee. The word mortgage applied to the estate denotes the estate pledged and it is used for the mortgage debt.

The condition annexed to the grant is called a defeasance, its object being to defeat the estate. This condition may be incorporated with the grant, annexed to it, or indorsed upon it, or in a distinct instrument. For it is a general rule that two instruments between the same parties created at the same time, relating to the same subject matter form but one.

Bowen M 5.

But this rule presupposes that the deeds mutually refer to each other, or that one of them refers expressly to the other. If the grantee give a covenant to convey the land back, by a separate instrument, but the instrument does not refer to the first, it is not a mortgage.

Mortgage

Lecture 19.²
 Case 221-1813.

2 Br 6, 58
 } Moore 114
 16. 79. 80

As soon as the mortgage is executed the mortgagee can take immediate possession, so he can be called to performance of the condition. The legal title vests immediately in the mortgagee upon the execution. Every day of the mortgagee has another way of an action, a covenant against the mortgagor, for the possession.

There is a distinction to be observed between a grant made to secure a debt or obligation, and a grant made to secure a debt. In the latter case the lender of the money discharges the lien upon the land, but the mortgagee may still recover his debt.

1 Inst 20.^a
 20. 2. 6
 } 335.
 338.
 47.
 6. 243.

But in the former the lender discharges the whole obligation on the part of the mortgagor.

3. 11. 7.
 } 1 Inst 205-6
 213. 221.
 16. 22

The condition of a mortgage deed was formerly considered as a condition precedent, but this is manifestly incorrect, as it operates in every manner as a subsequent condition. Conditions precedent have always regard to the creation of the estate, not to its defeasance. But the condition here operates to defeat the estate vested in the mortgagee.

1 Inst 221-2
 1 Br 6. 311
 6th 191.
 3 Bac 632
 2 Br 6 158

Formerly upon the forfeiture of a mortgage or fee, the estate being absolute at law in the mortgagor, his wife was entitled to dower. To remedy this inconvenience, the practice of mortgaging long ^{was introduced} ~~was~~ instead of the freehold. And tho' it has been long settled that the wife of the mortgagee is not entitled to dower, still the practice is not discontinued.

Equity of Redemption

Mortgage

It is not unusual for the mortgagee to require a bond for the performance of the condition in the deed, but this is unnecessary. For where there is no bond no payment at the due is a breach of the condition of the deed as well as the mortgage deed.

In *Ex. of Eg.* upon the breach of the condition, immediately the estate vested in the mortgagee a consequence of this was that very valuable estates were sacrificed for a trifling consideration.

It is also to be observed in *Ex. of Eg.* that the condition was a personal contract between the parties, and the estate merely as a security for the payment of the debt. And that therefore if after the forfeiture the mortgagee pays the money, the estate should be restored. There was a long contest between the *Ex. of Eg.* & *Ex. of Law* upon this subject, but the *Ex. of Eg.* prevailed. And since that time the jurisdiction of mortgages has been with the *Ex. of Eg.*

Equity of Redemption.

This equitable right which remains in the mortgagor after the forfeiture is called the equity of redemption — a species of right known only to the *Ex. of Eg.* Until redemption or satisfaction the mortgagee can keep possession and take the profits.

The equity of redemption does not commence till after the forfeiture.

Real Property

mortgage.

§ 100. 182.
 { 329. 342.
 2 d. 11. 649.
 1868. 968.
 Con.

§ 101. 599.
 { 314. 18.
 314. 18.
 495

From this view it follows that a mortgage is not such an alienation of the estate, as to defeat any former disposition unless the such former disposition is ~~inconsistent with it~~ necessarily affected by it.

There are certain discharges as respecting various devices & ~~inconsistent~~ mortgages. Where lands are thus devised, the mortgage of them is not in all cases a revocation of the devise. More of this when treating of Wills.

Every contract for the loan of money or the payment of a debt secured by the conveyance of real estate where the conveyance is not intended as a disposition of the estate, is not considered in law as a mortgage. By a disposition is meant a sale or alienation. And it has become a maxim in law "Once a mortgage always a mortgage". The true meaning of this maxim is that all agreements between the parties to avoid a redemption are void if made at the time of making the mortgage. In other words all agreements made at the time of making the mortgage to vary the equity of redemption are void. It is inconsistent with the nature of a mortgage, and against good policy.

Hence an agreement between the parties that the conveyance shall be deemed a sale unless the money is paid at the time it is made.

§ 102. 33.
 { 190.
 2 d. 11. 364.
 18. 11. 19. 28.
 { 34. 9.

Real Property.

Equity of Redemption.

Mortgage

And in the application of this rule it makes no difference, whether the proviso is in the mortgage deed, or in a distinct instrument.

And so scrupulous is the Pt of Court on this point, that an agreement at the time of giving the mortgage, that it shall become an absolute conveyance, unless repaid a day, provided the mortgage will advance an additional sum is absolutely void.

1 Vern 108. }
488. }

2 D 520.

But an agreement that if the equity of redemption is to be sold, that the mortgagee shall have the right of preemption is good.

2 B. & A. 599. }
H. M. 25. }

A subsequent agreement for the sale of the equity of redemption executed by the parties is good. It would be extravagant to prevent a purchase of this equity forever.

So also if the mortgagee releases the equity to the mortgagor upon conditions that he shall recover, upon certain conditions this release is binding, & the mortgage need not recover, unless the conditions are performed.

1 Vern 258. }
2 B. & A. 590. }
595. 590. }
Call. 2a 61. }
R. 25. }
Br. P. C. 149.

Again in some cases of family settlements & where the transaction is between members of the same family, & where there is a hindrance intended to the mortgage upon a certain event, there is an exception to the rule once "a mortgage always a mortgage".

Real Property

Mortgages.

Equity of Redemption

this — A. made a mortgage to his niece upon a valuable consideration. B. was, of family settlement with condition that the mortgage should not be redeemed during ^{unless} her life and the mortgagee, his representatives were not let in to redeem after her death.

So where A mortgaged lands to his brother on condition that if he died without issue that his brother should have them absolutely the will was adapted.

There is a certain class of opinions which go to establish the doctrine that an absolute deed without any written condition, under certain circumstances may be considered a mortgage ^{mortgage} as a deed. when (There are cases where) an agreement to redeem is inferable from circumstantial facts, which are notorious and in proving which there is no danger of committing forgery.

It is admitted that a parol agreement would not make the deed a mortgage, and such an one can only be implied. How then is this?

A executes a deed to B and gives B his note for the consideration of the deed. The grantor remains in possession receiving the rents and profits. The grantor pays the taxes & interest on the note. Now these facts being proved, in the proof of which there is no danger of forgery, clearly show that a mortgage was intended, & that

Real Property

Mortgages

this point there is no judicial decision.

Our Sup^r Ct have affirmed this rule, in the Ct of Errors reversed the decision in both cases.

For myself I say that if the Ct may thus deal with the stat, I see no harm that our rule in practice. But I doubt whether the rule would be adopted in Westminster Hall.

It is a clear case however that the pay-
ment of the debt may be proved by parol. Harnadist 40.
10 M. 52-53

agreement of money may always be proved by parol.
The mortgagee cannot be compelled to give
a receipt for the money.

So also where it appears that the mort-
gagee has forgiven the debt it may be proved by
parol. This is not an agreement to convey an
interest in land, & so is not within the stat. S.A.

Thus where the mortgagee in his last sickness
says to the mortgagor I forgive the debt, made
with your writing, this was held to bar a petition
for foreclosure by his representatives. —

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Real Property

Essence of the mortgage

Mortgage

Lecture 20

Regularly the mortgagee has a right to take possession June 22 1889

If however it is agreed as usual, that the mortgagee shall remain in possession, he is considered as a tenant from year to year.

But if he remains in possession without agreement, he is considered in the nature of tenant at will. This rule however regards merely the possession. For the mortgagee is still considered as the owner of the land.

He is however in some respects in a different situation from a tenant at will. He may be sued in respect of the mortgage, without notice to quit which an ordinary tenant from year to year is not entitled to.

On the other hand, a mortgagee is not liable to the ordinary tenant at will, because he is bound to pay the interest of the debt, for which the land is surely pledged as a security.

But if the mortgagee evicts the mortgagor before the time of raising a harvest, the mortgagor is not entitled to the compensation, because the whole land & crops growing upon it are bound to secure the debt.

A common tenant at will can under no circumstances whatever, underlet to another for this would instantly determine the estate. But a mortgagee in possession may make a lease to another, as long as the mortgagee elects.

It is doubtful if he may at his election treat the under-tenant as his tenant or as a subtenant. The lease of the mortgagee in possession is then in the same situation

June 22 1889

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Power of Attorney

Mortgage

generally as the mortgagor

State of the mortgage

Since the lease of the mortgage it shall be voided by the mortgage without notice.

It seems to follow also, that the under-lease when ended would not be entitled to the continuation any more than the mortgagor. This point has not been decided judicially however. *See Powell 1164.*

If the mortgagee give notice to the under-lease that he must pay to him the rent, the latter is bound to pay him, ^{all} that which is in arrears before the notice is that which accrues afterwards. If he pays it after notice to the mortgagor it is at his peril.

The mortgagor when sued in execution by the mortgagee cannot defeat the mortgagee by alleging title in a third person. Thus he is estopped from doing by his own deed; even tho' he had actually no interest in the mortgaged premises.

The rule is the same when the mortgagee is sued in execution by the mortgagor ^{or}. He is precluded from averring that the legal title is in the mortgagor ^{or}.

On the other hand the mortgagor having made a lease, cannot deny the interest of his lease, during the continuance of the lease. He is affected by estoppel again.

And clearly the lease of the mortgagor in possession, may maintain a writ against any stranger. For the lease's title is good against all persons except the mortgagee.

It is now fully settled that a lease conveyed

1. 4th 1833.

May 20th

Case, 409.

1. 4th 1833.

1. 259

1. 400

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Real Property

Estate of the Mortgagee

Mortgage

possession is sufficient to enable a tenant to maintain trespass against a stranger. New 11, 30.

The mortgagor's life may redeem of the mortgage Cro. Char. 304. For and

But the mortgagor is deemed in many cases in law, and always in equity, as the real owner of the land.

The mortgagee's interest is considered as a mere chattel. If then a freehold is mortgaged, the mortgagee still holds the freehold. So that whenever the law requires a freehold to constitute a settlement, the mortgagee will be entitled to one from his interest in the premises mortgaged. —

Hence an Equity of Redemption descends to the heir at law. The mortgagee's interest will pass in a devise under the words lands, tenements &c.

Don 510.
2 Vern 202
2 Burr 913
2 Hk 294.

And finally, it is assignable like any other real property, & he may limit any degree of interest the estate admits of. 2 V. B. 211, 270, 170.
1 Hk 305
5 Hk 157, 170, 113

But if a mortgagor in possession commits waste at 2 Hk 67 will restrain him by an injunction. And it is impossible. Now it is impossible that an action at law should be maintained against him, by the mortgagee unless a writ is mortgaged.

2 Atk 22.

It seems to follow from the rule however, that the mortgagor does not forfeit his right as tenant at will by committing waste.

Estate of the Mortgagee before forfeiture.

Immediately upon the execution of the mortgage deed, and before forfeiture, the mortgagee's interest continues to be 2 Hk 423.

Real Property

Mortgage.

Estate of the Mortgagee.
before forfeiture.

{ Poore 1199
228
2 Dec. 1856.

as it was at Common Law, before lts of By interpose.
For their jurisdiction commenced only with the Equity of
Redemption which accrues after forfeiture.

Dec. 22.
Poore 1198

Hence a conveyance or lease of the subject mort-
gaged made by the mortgagor before forfeiture is said to be
void as against the mortgagee. The rule is laid down in
correctly. The conveyance is only voidable, and may be con-
firmed by the mortgagee.

Aug. 26th

Where it is absolutely void, it could not be confirmed.
On this principle is founded the rule that the mortgagee
may, on notice, compel the under lessee in all cases to
take rent to him.

And this rule holds, even where the lease
was made prior to the mortgage. He is entitled to rent
on the ground that it is incident to the reversion
tho he cannot affect the lease.

But I conceive, that he cannot compel the
payment of rent which was due before the mortgage
was made. For that had already become a debt due to
the mortgagor.

When a term for years is mortgaged by a les-
see, the mortgage is in the nature of an assignee of
the term, provided the whole residue of the term is mort-
gaged. Otherwise he is considered only as a subtenant.

2
225
27th

But tho the mortgage is in the last case con-
sidered as an assignee, yet he is not liable to pay rent to
the reversioner unless he takes actual possession.

Real Property

Estate of the mortgagee
after foreclosure

Mortgage

For the mortgage was not regarded as a purchase.

Dougl 238 }
444 }
1811 105 }
Law M. 92 }

But if he takes possession he is liable upon the covenant to payment.

This rule obtains as well after foreclosure as before.

After foreclosure the mortgagee has in Equity only a chattel interest - even tho' he has recovered judgment against the mortgagor & has taken possession.

or a recovery in execution gives him no greater estate than he had before.

Hence the interest of the mortgagee will not even after foreclosure pass regularly under the description of lands, tenements and hereditaments. If the mortgagee however who makes the devise has no other property in lands, so the mortgage premises (that is his interest in them) will pass on the ground of intention.

And the interest of the mortgage remains a chattel, until foreclosure. On his death therefore it passes not to his heir, but to his personal representatives.

From the view I have already taken of the nature of the mortgage, and particularly from the manner that the debt as he principal, & the mortgage the incident, is governed, so that an assignment of the debt alone, as of the issue or note &c carries the mortgage's interest in the mortgage, tho' it is usual to carry it on a separate instrument.

The mortgagee cannot before foreclosure do any thing which would increase or diminish the mortgagee's right. Thus an a bill by the mortgagee to recover the debt

1. 24 00.
2. 22 00.
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100. 42

Real Property

Mortgage

1. 60 a. 610

Entails on the Mortgagee
 he no defence for the mortgagee to say that he has made a lease, which is not yet expired. The Lord Chancellor in this case says that the mortgagee, before foreclosure, cannot lease the premises, to bind the mortgagor or subject to admit an apparent loss from necessity. I conceive no, in any case.

2. 392.

392.

3. 44 723.

As a mortgagor or possessor cannot commit waste, so neither may the mortgagee before foreclosure.

R. 44 95.

If however the security is defective as if the subject mortgage is not sufficient &c - a mortgagee in fee may commit waste such as cutting timber &c, tho' he is obliged to apply the profits thereof to the payment of the debt. He can never, however, commit unproductive waste.

3. 44 723

Even in all cases when the mortgagee actually commits waste whether lawfully or not, he must account for all that he has taken from the freehold, by applying the amount first to the payment of the interest and then to the principal.

R. 44 84.

2. 44 518.

2. 44 84.

The mortgagee is allowed all necessary expenses incurred in repairs, as for the preservation of the estate. —

Real Property

Incidents of the mortgage after foreclosure

Lecture 21st
June 27th 1893.

If a mortgage is made upon an estate in which the mortgagee has no interest, afterwards the mortgagee conveys the estate to the mortgagee, the mortgagee will receive the benefit of the conveyance. This is called a graft upon the old stock. The mortgage is then entitled by a species of estoppel. For the mortgagee will not be allowed to say that he was not the owner of the estate at the time he made the mortgage.

1. 111. 11.
1. 111. 11.
1. 111. 11.

If the mortgage of a term of years procures a new term after the expiration of the first, he is deemed to hold the second term for the mortgagee, which the latter may redeem. The reason of this rule seems to be that as the original term is the cause of the renewing term, the mortgagee ought to have advantage of it as a right of his estate.

2. 111. 11.

A mortgage in possession is not bound to open entry upon the premises. But if he expends money in repairing the premises, he may add them to the debt.

1. 111. 11.

The mortgagee takes the estate subject to all the incumbrances to which it was subject in the hands of the mortgagor.

If then the mortgagor forfeits the estate (as in an estate in fee simple) the estate of the mortgagee is perfected. Suppose a tenant for life or years after his term remains in possession & commits waste, the mortgagee uses his estate.

2. 111. 11.
1. 111. 11.
591. 10. 11.

Real Property

Mortgage

Equity of Redemption in

If the mortgagor in perpetuity forfeits his estate to the crown, the title of the mortgage is not lost.

P. M. 111.

The king in case of a forfeiture takes only that estate which the person forfeiting had at the time, but the mortgagor had only the Eq of Red. but the reversioner or remainder^{man} is entitled to the whole of the particular estate upon the forfeiture.

Equity of Redemption.

It is the Equity of Redemption.

The equitable right remaining in the mortgagor after forfeiture is called the Eq of Red. This accrues after the forfeiture. It is called a trust or loan estate. On the legal title as in the mortgage and he is considered as having the estate in trust for the mortgagor until foreclosure. The mortgagor having a right to call upon the mortgagee for the legal title in or the payment of the debt & interest.

If the mortgagor may redeem at any time so may any other person having an interest in the subject mortgage.

Mort. 133

P. M. 108.

I makes a voluntary Conveyance to D, and after mortgages to C, there he may redeem, tho' his title is not good against that of C.

Mort. 111.

P. M. 108.

If the mortgage becomes a bankrupt his estate may redeem, all his interest is vested in them.

Mort. 112.

P. M. 108.

If the mortgagor makes a lease the Eq of Red is not lost, having an interest in the mortgage.

Real Property

Equity of Redemption.

Mortgage

If the mortgagee sells the E of R to another person
 the purchaser can redeem, as he comes into his place ^{190.} O. N. 104.

If the estate mortgaged is an E of inheritance
 his heir may redeem the E of R is his by descent.

If a chattel interest is mortgaged - the case 2 Bro 344.
 and a personal representative may redeem.

And an E of R is owned by the same 2 B. 948
 and descent as govern legal estates. 1 Ch. 2, 190

If then the estate mortgaged is a fee simple
 the E of R will accrue to the eldest son, 2 Bro 304
 the estate is of Borough English is the youngest son;
 if a husband is alive the wife equally, and in vacancy
 the issue of redemption, ^{and} to all the children equally.

And as the heir may redeem, so also the
 donee of an E of R may redeem, being an heir next 2 B. 948
 for the area pointed out by law whose title P. M. 104.
 prevails in the will.

A judgment creditor of the mortgagor
 may redeem, for the judgment is a lien upon his 5 Atk 200.
 estate. But it is not so in Connecticut, as there is 1 Vern 299.
 no priority of right among creditors. 2 Atk 440.
 1 Bro 102, 206
 3 Atk 116.

But for a judgment creditor in Can having
 since his execution upon the land may redeem. It is 1 Bay 95
 customary in Can to lay execution upon E of R & to
 charge of the interest of the mortgagor as in legal
 sales. And that of course vests the interest in the
 hands of the creditor.

Real Estate

Mortgage

Equity of Redemption

11/22, 1862

In Case the day may redeem where the mortgagor has forfeited his estate for treason or, as he has become the assignee of the Co. R. by operation of law.

The widow of the mortgagor having a part in the land may redeem. And I conceive that she must redeem the whole unless the mortgage will permit a part only to be redeemed. This rule relates to a purchase made after the mortgage. And it is always to be understood. For if the purchase is made before the mortgage, her title is paramount in that of the mortgage. And she can hold to the exclusion of him.

1 Dec. 1862.
11/22, 1862.
1862, 1862.
{ 1. 1. 2. 3. 4.
1862. —

And of a jointress of an estate mortgage having joined in the incumbering the estate, pays more than the third on redemption, she as her representative shall hold the estate against the heir at law, until he reimburse her the two thirds.

1 Dec. 119

Where a jointress redeems she is obliged to redeem ~~the~~ ^{her} part only and then of the debt and no more, ^{and not a fee} a life estate is considered as equal in value to another and her representative shall hold against the heir until he reimburses her, if she has paid more.

1 Dec. 1861
1862, 1861
{ 1861, 1861
— 1861

That this rule holds only when she has joined with the husband in incumbering the estate. ^{if she has not joined} For here she is entitled to the whole she has advanced and she will receive back that of the mortgage if she dies with her husband. And if she survives him, she will receive the whole of the mortgage on redemption.

On the other hand a mortgage is not a security. P. 100 R. 559
 There is not a loan or a loan of the Equity. 7 Wm.

Now from former rules it is evident that
it is impossible that they ^{supposed} ~~possess~~ could have sex
as they ^{never} ~~are~~ found alone.

Real Property

Mortgages

Equity of Redemption.

2d ed. 34.

700.000. 52.

P. 111. 112. 113.

117.3

A subsequent mortgagee may redeem a prior one i.e. of himself mortgagee or subsequent one regardless of a prior. So also in C., a judgment creditor may redeem of the mortgagee, as he is considered an assignee of the mortgagee.

There may be more than one subsequent mortgagee, a judgment creditor, or a referee to the mortgagee, the mortgagee may redeem out of his hands. If mortgage is made to A, after to B, A is an assignee. B is a second mortgagee, mortgaging to C. A has no dispute with C, who is a judgment creditor. Now if the second mortgagee redeems of the first, he is to hold against the mortgagee, unless he has paid the whole amount at both of the debts, & of a third. But there is still the ordinary interest of the mortgagee, and when he pays up the interest he can recover the estate. This rule extends indefinitely. Thus upon the death of the mortgagor, the heir will be entitled to the ordinary interest, or a division, unless the mortgagee has paid up the interest the ordinary, perhaps this ordinary interest may redeem.

The rule then is, if a subsequent mortgagee, a judgment creditor, or a referee of the mortgagee redeems, the mortgagee, or his assignee, or his heir, or his executor, may redeem out of his hands, it is one of the ultimate right of A. resides

Real Property.

Equity of Redemption.

Mortgage.

Locke 21st
use 25. 1518.

It has been once determined in a mortgage
for many years, after a release to the mortgage of his Equity
of Redemption, where it appears from circumstances that the release
was made as a secret trust for the benefit of the mortgagor.

16th to 18th
E. 11. 159. 20.

His redemption is carry a great way.

If an estate is holden by tenant for life
remainder in fee, then the tenant for life must pay
proportionally, that is the tenant for life one third, &
the remainder man or remainder the remaining two thirds.

16th to 22nd
E. 11. 159. 20.
{ 159. 20.

And if the tenant for life is compell'd to pay the
whole on redemption, he & his representatives must hold
the land until the remainder or remainder man pay
his two thirds.

It is said in some cases that the tenant for life
must pay but two fifths but this is not the rule. T. 120.

And if the mortgage money is paid at
a future time, the remainder or remainder man may bring
his bill to compell the tenant for life to keep down
his interest during his own life or resign the property.

16th to 22nd
E. 11. 159. 20.
442. 454.

If a tenant for life pays the whole
at once redemption, and improves the land, the re-
mainder man or remainder man must pay two thirds of the
redemption money & also of that expended on the
estate's improvement, but he is a bar no more
upon the money advanced for the tenant for life
is bound to keep down the interest during his life.

2 E. 11. 159. 20.
595.
Gild. 11. 159. 20.

But as an Equity there is equitable apportion-
ment the Equity of the Red. is sold to the amount due by him.
and be divided pro rata among all creditors, in the
contract as well as here. For in Equity there is no priority
among creditors, of such as an E.L. all are paid pari passu

In Bon Esq's case are affected at once, & on the death of the mortgagor are liable to sale, for all debts. On the 3^d: the mortgagor's survivorship absolute in a mortgage for years or life is legal effects about a creditor therefore may have judgment against the estate, with a specific execution until the estate fails.

17. 125-3.
 Fern 416.
 Fash 354.

man having a term for 30 years morige-
ges at his 20 now he has a remainder, shaltered interest
of 30 years remaining in him, if then he dies ten years
after, there will remain an interest in the executor
or administrator, and ~~at~~ judgment may be had
against him for with a caveat executed for the
remainder interest, untill the ten years have expired,
when the execution may be levied upon said remain-
ing interest.

Pl. 513
2151.

No regular debt have I ^{any other} more than
yet a second mortgage as preferred to a ^{interest}
editor, for this his is but an equitable interest; he
has a lien upon the estate.

Real Property.

Mortgage

Equity of Redemption.

Term 101

Now as between one who has a lien upon the ~~land~~ ^{land} and one who has none, there is a priority in favor of the first in its right as well as in law. Tho' the first have but an equitable interest, he has a lien upon the estate which the second creditor has not.

27th 29th

There is no instance in Eng^l in which an Eq^r has been taken liable to execution in the life time of the mortgagor. And after his death it becomes equitable what goes for the payment of all debts equally.

Ple. 135.4.

{ 27th 29th
105.

Term 182.

Power gave down a general rule that no one can redeem unless he is entitled to the legal title. This is an absurdity as it stands, since he who has the legal estate cannot redeem himself. But the reason is that no one can redeem who has not the master title of redemption. He must prove that he has such a title to the or he cannot redeem.

Thus where an Eq^r was limited in tail, & the heir general brought his bill to take his chance to redeem, the Ld Ch considered him as a stranger to the redemption, and consequently would not permit him to redeem.

Term 182.

But however, if he who has the title of redemption is no other person interested may redeem. Tho' he is no heir. This is an exception to the former general rule.

Real Property

Equity of Redemption

Mortgage

It also in common cases if the mortgagor has well redeem the creditors cannot insist if L.C. he refuses, and would lose it rather than pay the debts they may redeem. The heir has the ultimate equity of R.

It is a fundamental principle with regard to an Eq of Red, that as it is a creature of a Stat of Eq, that it will always make the right paramount to its own rules, i.e. the rules of the Court of Equity. And it is one of the first rules that he who seeks equity must do it.

10 Me 235
2 Me 132
16 Me 246
Camp 608
2 Vern 532

And the Court will adjudge the same plain either as absolute or upon terms as they see fit.

And if the mortgagor having previously attended to the said mortgage at law, afterwards agrees to redeem, he will not be allowed to redeem but upon condition of paying the mortgage all the costs & expenses incurred on the trial.

2 At
Don 124
4, 9.

The mortgagee can never compell the mortgagor until the term of payment arrives. But in case of a hard bargain upon the mortgage, the mortgagee or Chancery will give him permission to redeem before that time.

1 Vern 132
222, 223
8 Me 137, 9

If a mortgagor applies for redemption he has been quiet a long time upon the mortgage, he must remove that objection before he can claim permission to redeem.

Real Property

Mar. 24.

Principal Money

{ * interest debt
{ 1/2, 1/4, 1/8, 1/16, 1/32, 1/64, 1/128, 1/256, 1/512, 1/1024, 1/2048, 1/4096, 1/8192, 1/16384, 1/32768, 1/65536, 1/131072, 1/262144, 1/524288, 1/1048576, 1/2097152, 1/4194304, 1/8388608, 1/16777216, 1/33554432, 1/67108864, 1/134217728, 1/268435456, 1/536870912, 1/1073741824, 1/2147483648, 1/4294967296, 1/8589934592, 1/17179869184, 1/34359738368, 1/68719476736, 1/137438953472, 1/274877906944, 1/549755813888, 1/1099511627776, 1/2199023255552, 1/4398046511104, 1/8796093022208, 1/17592186044416, 1/35184372088832, 1/70368744177664, 1/140737488355328, 1/281474976710656, 1/562949953421312, 1/1125899906842624, 1/2251799813685248, 1/4503599627370496, 1/9007199254740992, 1/18014398509481984, 1/36028797018963968, 1/72057594037927936, 1/144115188075855872, 1/288230376151711744, 1/576460752303423488, 1/1152921504606846976, 1/2305843009213693952, 1/4611686018427387904, 1/9223372036854775808, 1/18446744073709551616, 1/36893488147419103232, 1/73786976294838206464, 1/147573952589676412928, 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Part 3: Mortgage

Equity of Redemption

Mortgage

Lecture 32.
June 20, 1875.

Term 33. 1
p. 450.
Lick 155.

Term 34.
p. 451.
Lick 155.
p. 452.
Lick 155.
p. 453.
Lick 155.
p. 454.
Lick 155.

A purchaser of the mortgage must not hold the bond against the mortgagor & his heirs for the sum of the mortgage although he receives it for a full sum.

But as against subsequent incumbrancers - such as he will hold until he gets what he gave & is indebted to the lender or creditor, then can redeem any of his loans for the sum he gave and need not pay the whole original sum, if the purchaser pays to him that sum.

The rule is the same with a bill of exchange, where the purchase is made by the bill holder or agent of the mortgagor, here not only the creditor but the holder of the mortgage will have the advantage of the discount for the purchase made on the date of the mortgage.

If a mortgagor is indebted to the mortgagee under a loan, the mortgage contract he will not be permitted to redeem until he pays both debts. But as the rule when the mortgagee agrees for redemption, then when the mortgagor presents his bill for redemption, he cannot compel the mortgagee to pay both debts or lose his bill, but only that upon the mortgage contract. Here the mortgagor is defendant in equity & consequently no terms of redemption other than those of the contract cannot be imposed upon him.

Term 34.
p. 451.
Lick 155.
p. 452.
Lick 155.
p. 453.
Lick 155.
p. 454.
Lick 155.

Dec 30 1897

Mortgage

Case in Redemptio

20th 1897
 21st 1897
 22nd 1897
 23rd 1897

and the rule which holds as to the original
 mortgagee, that he must pay both debts before he
 can have his debt as regards the mortgage. The same rule
 applies to a paying simple contract debt, for he is not
 bound for such debt of his, unless so.

20th 1897
 21st 1897
 22nd 1897

The same rule that applies to the land
 where an insurance is mortgaged, holds as against the
 personal representative, when a charge interest is mort-
 gaged. Thus if a person conceals however true it would
 make no difference whether the other debt, more than
 a simple contract or even a personal representative.
 Estates are liable for the simple contract debts of the
 testator.

20th 1897
 21st 1897
 22nd 1897
 23rd 1897

But if there are several successive
 circumstances, & the first mortgage claim, a more
 debt as well as that due by mortgage has been
 debt will be postponed till after the successive
 circumstances are satisfied, whether they are made
 by judgment, mortgage or statute. For all incum-
 brances have a lien upon the land which gives
 them a stronger claim than other creditors.

20th 1897
 21st 1897
 22nd 1897
 23rd 1897

And since the state of 1897 & 1898
 of grant fraudulent denies the same rule then ap-
 plies to the fee holds also against the devise of
 the mortgagee.

20th 1897

On the other hand if the assignee of the
 mortgage holds a lien debt against the mortgagee he
 has the same equity against the mortgagee as his

Real Property

Equity of Redemption.

Mortgage.

Lend to the mortgagee had

But it makes no difference whether the said debt was contracted first & the mortgage made afterwards or vice versa.

Where the mortgagee or his representative is present, it will carry the debt beyond the penalty, provided the debt and interest exceed that penalty. This would appear like making a new contract, but I observe that the Act is not making a new contract but say that to the mortgagee, you come to your equity and you must therefore do it, & unless you pay the whole amount, we will not interfere in your favor. But this has never been done when the mortgagee presents his bill for foreclosure, for that would make the mortgagee hold to a contract which he never made.

280 p. 1011
 280 p. 515.
 280 p. 154
 3. 4. 6. 4. 2. 4
 4. 5. 5.
 2. J. R. 388.
 3. Bro. 280.
 2. 2. 1. 718.

280 p. 154
 3. 4. 6. 4. 2. 4
 3. 4. 6. 4. 2. 4

In one case terms may be imposed on the mortgagee, but here the mortgagee always is to be relieved against a penalty by which he has bound himself.

In the other case where the mortgagee brings a bill to ~~to~~ for foreclosure, he is endeavoring to compel the performance of a contract made between him & the mortgagee, and consequently cannot impose terms other than those contained in that contract.

If the mortgagee or his assignee, counter-claims that the mortgagee has committed a fraud upon a third person, he can be relieved by paying the mortgagee more only.

Real Property.

Mortgages.

Equity of Redemption.

Smith. 89.
511.
116.
116.
169.

So the mortgagor & his heirs in the above mentioned cases, are compellable to pay the last debt, yet a purchaser of the Eq of Red for a valuable consideration is not bound to pay the last debt in order to redeem, but must pay only the mortgage money.

The mortgagee's claim as to a debt not secured by mortgage, is good only as against the mortgagor himself & his heirs. It is not good against a subsequent encumbrancer, nor a purchaser of the Eq of Red.

The mortgagor's Eq of Red may, in consequence of lapse of time the mortgage being in possession, length of possession (after forfeiture) in the mortgagee is not strictly absolutely a bar of the Eq of Red, for mortgagor as between the & mortgagee.

11. 149.
11. 149.
11. 149.

are not within the Stat of Limitations. The reason why, as between them & their executors or administrators are not within the Stat is that the possession of the mortgage as such is not adverse to the mortgagor.

Still however the Stat of 20 years for limitation of the Stat of 20 years after forfeiture, prima facie a bar to the mortgagor's right of redemption. But a prima facie presumption that the mortgagor has abandoned his right, it is not an absolute a legal extinguishment of that right per se.

11. 149.
11. 149.
11. 149.

But however the Stat of 20 years for limitation of the Stat of 20 years after forfeiture, prima facie a bar to the mortgagor's right of redemption. But a prima facie presumption that the mortgagor has abandoned his right, it is not an absolute a legal extinguishment of that right per se.

Equity of Redemption

Mortgage

Powell suggests an additional reason why
 that after the mortgagee has been in possession for ^{10 years} ^{15 years}
 as in time, would ~~exchange~~ ^{subsume} the accounts, & render
 them ~~complete~~ ^{complete}. Tho this might have had some in-
 fluence in the formation it could not be the foundation of it.

This prima facie bar then being
 a mere presumption, it may be removed or rebutted
 by such circumstances as will account for the
 delay, consistently with the mortgagor's intention of his rights. ^{Stat. con 205}

And if the presumption may be rebutted
 by any circumstances that come within the start
 at disability. To suppose the mortgagor to have been
 insane, or imprisoned or been beyond seas, the presump-
 tion is rebutted.

But it may also be rebutted by ^{2 Vent 342.}
 proving the relation between the mortgagor & mortgagor, ^{2 Atk 333.}
 you to have been ^{2 Vern 418.} ^{2 Atk 313.} ^{2 Ld. 254.}
 the recovery the interest of the mortgage debt
 within 20 or 25 years.

And in cases where there has been ^{3 B. & 274}
 disability on the part of the person having a right to the money
 & ^{allowed} after the time after the removal of the
 disability, to the person to redeem is the same as that
 allowed ¹⁰⁷
 the statute of limitations.

But where a grain has been practised
 upon the mortgagor to prevent his redemption, no

A. 1822

Dart. 3a 62.

P. W. 157.

P. W. 218

P. W. 176

P. W. 241.

2 Jan 181.

2 Jan 181.

Mortgage -

length of time will bar the right of redemption.

Where it is agreed that the mortgagee shall take possession - here held he is satisfied no length of time will bar the right of the mortgagor to redeem. Also it has been held that possession for 30 years in case of a mortgage of this kind, will not bar the right of redemption.

The rule is the same in case of a Jewish mortgage as it is called in one by the condition of which the money is to be paid upon a given day in a certain year, or on that day in any subsequent year.

Any act of the mortgagee by which he has recognised the right of the mortgagor to redeem, within 20 years in Eng or 10 in Bar, will remove this equitable right bar.

If the mortgagee has presented a bill to foreclose at that time, this is a recognition of the right of the mortgagor to redeem.

So also if he has applied within the time specified for the purchase of the right of redemption of the mortgagor, this is a recognition of such right in the mortgagor, and consequently will remove the bar.

Also any account having been kept of the profits or interest &c will have the same effect.

P. W. 241.

P. W. 241.

P. W. 241.

P. W. 241.

P. W. 241.

P. W. 241.

Real Property

Equity of Redemption.

Mortgage

If the mortgagor remains in possession he is ^{Lease} ^{June 30th 1817.} ^{V. M. 100.} never barred nor even prima facie by any lapse of time.

It remains mortgage of the same nature.

It is considered a mortgage of the land itself & not of the Equity of Redemption. If it were so it would follow that he could never redeem the first until he had the second.

Again if the second mortgage were considered as that of the Eq. of Red there could never be a third.

The interest of the mortgagee is a chattel interest. It is a subject of disposition as other interests. ^{18 L.R. 33.}

It is devisable & the devise may have a bill to foreclose. And being considered as a chattel interest no

words of limitation are necessary in a devise to pass the whole of it. It is not necessary to devise it to it & his heirs or his executors &c, but it will pass under

under these words "I devise to A all my mortgages." ^{2 Burr. 78. 2.} ^{Gr. Ch. 544.} ^{449. 450.} ^{V. M. 107. 110.}

If a mortgagor devises his interest, the devisee may foreclose without or redeem of the mortgagee & his heirs, without making the heir of the mortgagor a party, because he has no interest. ^{18 L.R. 33.} ^{Gr. Ch. 544.}

I do not know whether it has ever been judicially settled whether a mortgagee's interest will pass under a devise not attested according to the stat. of grants & purpuses. I conclude however that it will, as it is not real estate, & the words used in the stat are lands & tenements.

The rule that a mortgage will not be regarded as a devise is not universal.

Shower 6589
Carthar 79:41
3 Mod. 260

The rule that a mortgage will not be regarded as a devise is not universal.

The rule that a mortgage will not be regarded as a devise is not universal.

The rule that a mortgage will not be regarded as a devise is not universal.

Real Property.

Florida.

Priority of African horses

side for the
2 term 42.
1st 3.
2 den - 55.
2 Rev 44.
Back 35.49
to me 26.

pay under the works lands and tenements renders it not
able to do so.

vide opposite page 1

Le Priority of Incumbrances. — and the
practice of taking prior & subsequent Incum-

If there are several mortgages or encumbrances
 1. On the same estate, priority takes place among the
 2. them 31.524 according to the date of their respective
 3. 40. 58. mortgages. I am prior to the prior ~~one~~ ^{other} not here.
 4. 2 Dec 44.

But this priority under certain circumstances
may be lost or forfeited, & thus a priori circumstances be
postponed to a subsequent one.

2. 2nd 119.
 Barnardist 101.
 Roberts on grandeur
 2. 2nd 119.
 2. 2nd 119.
 1. 119.
 P. M. 143.
 Q. G. 152. 155
 1. 119.
 1. 119.
 1. 119.

So also where the first mortgage was
subject to the second mortgage debt, & knowing the
contents of the second and did not mention his own
the second mortgage was held to subject property to
the first.

Re: Mortgage

Priority of encumbrances.

Mortgage

be considered prior, though it was formerly considered otherwise.

And if the first mortgage is guilty of any neglect, in consequence of which a second person is induced to lend money upon the same security, he second will be considered prior to the first. Thus the owner the deed is in the hands of the mortgagor &c.

It being said that the mortgagor owns the whole of the land, the title deeds are not necessary.

For it is a rule that where an innocent person suffers from the neglect of any persons he who is guilty of the neglect must be the sufferer.

This is the rule in Eng but I trust cannot hold in Con nor in those states in which the town records are the highest evidence of the grantor's title. This title is on the record, and a third person by resorting to this record can ascertain where the real title is.

And since such neglect will thus subject him to postponement a fortiori an concealment will. Thus if a person about to lend money upon a mortgage, applies to another to know whether he has a mortgage upon the same lands & he having answered it, he will be postponed to the second. But he is not bound to tell unless informed by the inquirer of his intention to lend upon that security, or if he is

Very 250
1 Oct 1840
2 Dec 1841
28. 11. 450
10. 12. 500
762. - 3

East 486
Br. C. 269

2d ed.
P. 187. 90.

Real Property

Mortgage

Priority of Incumbrances

2^d A prior mortgage may be postponed to a subsequent one, ^{where the subsequent one} ~~has~~ ^{has} purchased the legal estate.

Having obtained the legal estate he has obtained a priority over all others. This rule is founded upon the maxim that where the equity is equal between two or more claimants the legal title shall prevail. ~~But~~

This purchasing the legal estate is called taking the legal and equitable title.

But if the third mortgage at the time of lending his money, on the same evening, knew of the intermediate mortgage, he cannot by producing the prior incumbrance notice his own. ~~But~~ if he did not know of the intermediate mortgage, until he had loaned his money, he will have a right to protect himself by taking the legal estate.

A subsequent mortgage may take in two manners not only by purchasing a legal mortgage, but by purchasing every interest which carries the legal estate, or by purchasing an outstanding term or one which has been reserved to trustees for some special purpose, or a priority may be obtained by taking a judgment, which carries the legal title.

2 Dec 1839

12 Dec 1840

1 Dec 1840

2 Dec 1840

12 Dec 1840

2 Dec 1840

12 Dec 1840

12 Dec 1840

2 Dec 1840

12 Dec 1840

2 Dec 1840

12 Dec 1840

2 Dec 1840

Real Property

of tacking prior and later incumbrances. Mortgage

And a subsequent mortgagor may tack in this manner to the first mortgage, but by purchasing an incumbrance which carries the legal estate.

This priority may be obtained by tacking to a judgment, when it carries the legal estate. 2 Vern 279. R. M. 198. 204.

In all these cases of tacking the subsequent incumbrancer who purchases the legal estate holds it ^{subject} to the amount of the incumbrances purchased. 1 Vern 49. R. M. 229.

The effect of tacking is that, the intermediate incumbrancer can never avail himself of the tacking against the earlier incumbrance. but also the amount of his own debt secured by the subsequent incumbrance.

To the general rule that priority of date will prevail there is an exception where one of the parties has more equity to call for the legal estate than the others. That is where one has a title to the legal estate tho' that title is not vested in him & before one of three mortgages has entered into a contract for the legal estate, tho' it has not been assigned to him, yet he will have the priority the same as if there had been an actual assignment.

And execution contract in Equity has the same effect, as if executed.

And where the subsequent incumbrancer purchases a prior ratified incumbrance, if it is one which can be used at law he gains priority over the intermediate incumbrancers. ~~It is always necessary~~

2 Gray 505
2 Vern 500
2 Ch Ca 213

Real Property

Mortgage of land prior to latter incumbrances

1 Vern 159.
Horn 315
2 Vern 20. 159.

By a satisfied incumbrance is meant one that is paid up after forfeiture. The legal title altho' barren & fruitless is still in the mortgagee till he releases to the mortgagor.

1 Vern 323.
2 Vern 299.
1 Exch 35.
Cale. 214.

And this rule holds tho' the subsequent purchase incumbrancer purchases the legal title without consideration. Indeed the rule has been carried still farther in Eng, and it has been holden that even if the subsequent incumbrancer obtains the first incumbrance by fraudulent means, yet he obtains the priority. The case supporting this principle is indeed a very rank one. And it seems to me to be carrying the rule to a very great extremity. If a man has no right to it, he has nothing but the mere possession, & that by surreptitious means. He could have been sued for it.

~~2 Vern~~
1 Vern 52-3
2 Vern 159.
Blenbury 298.
Cale. 215.

July 31
EGL

Real Property

Ranking Incumbrances

Mortgages

The general rule of ranking is that a mortgage ^{purchaser} takes priority over subsequent incumbrances by ranking the legal estate ^{incumbrances} in order of time, June 29, 1873. But where the prior incumbrance is defective in legal requisites it will give no priority to a purchaser of the subsequent incumbrance. For if there is a judgment in ^{this} case the priority will be defective it will not be an incumbrance.

2 Barn 275,
18 Ves 267,
2 Co Ca abt 542,
4 Price 504.

A subsequent mortgagee can take no other than the legal title to protect his lien. If therefore ^{from the} first incumbrance purchases a second he will not have priority after the third, for the ^{incumbrance} first has the legal title.

2 H. & W. 440,
18 Ves 267.

A subsequent incumbrance cannot touch the legal estate so as to protect his lien while he has equal equity with the intermediate incumbrance.

2 P. & D. 401,
2 Des 674,
P. & D. 401.

For the governing maxim is that where the equities are equal the legal estate will prevail.

1 Co. Ca. 117,
V. L. 222 to
226.

And a prior mortgage purchased will give no priority unless perfected by its mortgagee as at the time of the purchase. Before perfection there is no title.

2 Barn 275,
18 Ves 267.

Having the legal estate in the first incumbrance, may take a subsequent mortgage in himself upon the same security, & thus gain a priority as to respects the next mortgagee over the intermediate incumbrances.

18 Ves 267,
2 P. & D. 401-409,
18 Ves 267,
2 T. C. 594,
P. & D. 225.

Thus it gives him the priority to take a mortgage that he must have advanced the money on the mortgage notice of the intermediate incumbrance.

Mortgage Real Property ~~Real~~ Property Incumbrances

41222

3. 5. 22

[Faint handwritten notes at the bottom of the page]

As to the security which is enjoyed by creditors who have general liens, there not being so strong as specific liens, they have not equal equity.

2. 2. 2. 41.

alt 449.

9 B.C. 243.

Notice of Prior Incumbrances

Mortgage

If the first mortgage deed contains a clause saying the subject mortgaged a security for future loans such future loans will be considered as having relation to the first mortgage.

These future loans will have priority over the claims of any intermediate mortgagee provided the person making them was ignorant of the intermediate incumbrance. If however such subsequent loans were advanced after a mortgage to a third person, they will not have priority if the lender of such mortgage knew of the same.

And the lender of these subsequent loans will have priority over such other mortgagee who had notice of such mortgage, provided that mortgagee knew of the clause in the first deed.

3 Tins 52
P. M. 229.2
236. 285.5

According to these rules the right of priority depends in general on the want of notice on the part of the person advancing the money. What is notice then? It is of two kinds, actual & presumptive.

1. . . . One is said to have actual notice when he is party to a deed reciting or showing the fact or when he has notice of the fact regularly conveyed to him. But a vague report is not considered as notice.

L. J.
Goulburn v. Goulburn.

2. Presumptive notice is a conclusion of law that one has notice of the fact tho' there is no proof of actual notice.

Real Property

Mortgage

Notice of Prior Incumbrances

1 Vern 519.
2 Qs 662.
2 Cy la 215.

When one cannot make title without a deed giving notice of the fact, he is deemed to have notice of the said fact.

Des 215.
1 Vern 384.
2 Qs 481.
1 Vern 266.

Again if I devise lands to A subject to certain legacies, & I mortgages to B, B will be considered as having notice of it being subject to those legacies, as he will be presumed to have examined the will.

1 Vern 571.
1 Qs 287.

Is also a recital in one deed ^{or mortgage} citing an incumbrance on the land by a prior ^{or another} deed, is considered as sufficient notice.

1 Vern 490.
322.

And it is a general rule that whatever facts are sufficient to put the party charged with the notice upon an inquiry, it is deemed sufficient notice.

And I conclude that possession by a prior mortgagee would be sufficient notice of his incumbrance to a subsequent one.

1 Vern 49.
2 Qs 477-480.
3 Vern 574.
1 Qs 205.

It is a general rule that notice to one's counsel attorney or agent while acting for the principal is notice to himself. Qui facit per alium facit per se. And this rule holds where one person is agent for both parties.

1 Vern 609.
1 Qs 244.

And another important rule is that one makes a person his agent at once by agreement to a contract made by that latter for him. The other as authority.

Real Property

Notice of Prior Incumbrances

Notice of an act of law ^{as to} mortgage. Valle 55.
2 Dec 599
The mortgagor, will not be presumed against a subsequent mortgage lending his money after the act of barbara Key committed, so as to prevent him from taking a prior incumbrance.

So also a mortgage who takes his mortgage after a judgment obtained by a third person 1 El Ca 35
PM 285-2 can obtain priority over the third person by taking, for said judgment is a matter of public record and the third person is not to be presumed to know it.

I consider it a matter of doubt whether a subsequent mortgage can ever acquire Stat Ca 2
217. 415 priority by taking provided the intermediate mortgages are duly registered. The records are designed for the sole purpose of giving notice to third persons, not to give priority to the mortgagor or mortgage. And I should conceive it to be sufficient notice.

I should entertain no doubt of this notice being sufficient, were it not for a rule in Eng. that in their registration countries, such registration shall not be deemed constructive notice. But those cases which have

A subsequent mortgage registered is considered prior to one not registered if the subsequent mortgagee had no notice of the prior one. But if a third mortgagee had notice of the second which is not registered Gough 12.
1 Dec 54.
218th 215
3 Dec 646.
12 he will not gain priority by registration.

Real Property.

Mortgage

Notice of prior incumbrances.

For a purchaser of a mortgage for a valuable consideration, with notice of a prior voluntary incumbrance, altho' the subsequent incumbrancer had notice of such incumbrance. For voluntary conveyances are void by stat. against subsequent mortgages for a valuable consideration. The Stat. of 1838 seems to confirm that a settlement would be void against subsequent conveyances for a valuable consideration, where there was notice of such settlement.

If a purchaser with notice of a former incumbrance, and then sells to B who has no notice, B is not affected by the notice to A, & can take as to gain priority.

Thus, if mortgage to J. then B sells to A who has no notice, A is not affected by the notice to J. For as the original mortgagor might have assigned to him without notice, so that he might assign a priority to the assignee of the mortgagor, and convey in such a manner, as not to deprive another of the right of priority. If a person purchases for a valuable consideration with notice of a former incumbrance, then one who bought without notice, the last purchaser is not affected by the notice to himself. For the last person has all the right that the first has. The first has a right to back, and therefore the latter has.

1838 Act 232.

Stat. 296.

1838 Act 711.

1838 Act 59.

2nd Stat. 12.

1838 Act 232.

1838 Act 232.

1838 Act 59.

1838 Act 711.

1838 Act 59.

1838 Act 232.

1838 Act 232.

Real Property

When a forfeited mortgage belongs Mortgage

When the interest of the mortgage belongs to the
upon his death Lance
June 30. 1813

The interest of the mortgage being ^{personal} personal
it accrues to his representative not to the heir. Some distinctions
were formerly taken in cases where the money was to be paid
to the heir & where it was to be paid to the executor, &c
but these distinctions no longer exist.

*Bar 176
169 Ca 326.*

The application of this rule may be avoided
where the intention of the testator was to the contrary
as if he has made a different disposition of the
money. 2 Vent 349
168 Ca 255.
Harder 409
B.M. 298
304. 499

The rule now proceeds upon this ground that
as the loan or debt arose out of the mortgage's personal
fund, so the payment should accrue to that fund.

Still however if the money is payable to the
mortgagee his heirs or executor the mortgagee is at
liberty to pay at the day of payment, ~~at~~ ^{at} liberty to pay
either at his election. But if he does not pay on the
day he must pay the personal representative.

But this rule holds only when the money
is paid on the day, and the mortgagee by paying it
he either performs his contract.

When upon a forfeited mortgage the money
is paid to the executor the heir is bound to release
to the mortgagee. The legal title being nominally in
him. And the Ct of Eq. will compel him to do so.

*Bar 29.
30.
168 Ca 255.
B.M. 298-9.*

Real Property

mortgage - To whom a perfected mortgage belongs.

3 Dec 1841

Upon the death of the mortgagor his interest devolves to his heirs, they may as completely as he make a valid release to the mortgagee upon the payment, for he is thus compellable by the Statute which is what in law is compellable to do, he may do voluntarily & it will bind him.

By a late stat in Eng. the executor or administrator may in this last case make a valid release.

2 Dec 1845

2 Dec 1845

If then upon a perfected mortgage the money is paid to the heir he is compellable in a legal sense to pay it over to the personal representative. The mortgagor indeed may be compellable to pay again, if the executor chooses, but it is left unconscientious to apply to the heir.

2 Dec 1845

Thus that the mortgage should die before forfeiture, in which case the mortgagor is entitled in person to the heir or executor on the day of payment, if he pay to the heir, the latter can be compellable to pay it to the personal representative, since it makes no difference as to the heir of the mortgage & his personal representative, whether the money was paid before forfeiture or after, at the day of payment at last.

2 Dec 1845

2 Dec 1845

And if there are several executors any one may receive the money & give an acquittance.

2 Dec 1845

1845

2 Dec 1845

If then the mortgage was interest, upon the forfeiture vests in the administrator & if the heir is an actual possessor he can be

Real Property

To whom a forfeited mortgage belongs. Mortgage
compelled to convey them to the personal representatives
in a Court of Chancery

And this rule ^{vol. 4} as between the heir
& personal representatives, when there are no debts on
the estate of the mortgagor; they will be intitled
to it for the purposes of distribution to the legacies of
the mortgage. And tho the mortgagor relieves to
the heir of the mortgage, still the personal repre-
sentative is intitled to the estate.

And the rule is the same if the ^{former} mortgagor
had been ^{fore} ~~closed~~ unless the mortgagee had
taken actual possession. Nothing short of possession
& actual possession converts his interest into equity.

These rules govern where the mortgagee
discovers no different intention, for he may dispose of
it as he pleases.

If the owner of the incumbrance inten-
ded to hold it as real estate, upon his death it
will be considered as such.

When a person purchases of the mortgagee
by an absolute deed, he having purchased it to hold
as real estate & not as a security for the payment
of a debt, it will go to his heir & not to his executor.

Again if a mortgagee devises his
~~own~~ interest as real estate the heir & not the exe-
cutor of the devisee will be intitled to it.

1550m 271.

See on Chancery
2 Corn 151
2 Burr 126.

Real Property

Mortgage. So when a forfeited mortgage belongs.

This limitation however in the devise of the original mortgage, does not prevent the devisee from disposing of it as he pleases. For where the gift to the devisee was absolute, tho' the limitation will have effect in the disposition of the estate after the death of the devisee it will not prevent the devisee from disposing of it as he pleases.

30. W. 217.

If money is secured upon a mortgage is ordered to be laid out in lands, it will go as land settled by the articles wants same gone

If two persons make a loan and take a joint mortgage, they are not joint tenants or purchasers would be, but they are tenants in common, this ^{was} undoubtedly their intention, & therefore there is no survivorship.

1 Dec 15.

2 Dec 258.

30. W. 158.

30. W. 733.

2 194. 75.

1 30. 217.

And the rule prevails even tho' the two mortgages should foreclose the mortgagee & then we should see, there is no survivorship.

There are some cases where the mortgagee will refuse to the consent of the mortgagee's wife after he death.

294.

As the wife by joining with her husband may lose her right of dower so by the same way she may surrender it with a mortgage.

1 Dec 258.

30. W. 158.

But the right of the mortgagee's wife to dower is paramount to that of a mortgagee in a mortgage made by the husband alone during his lifetime.

Real Property

Wife's interest in her husband,

mortgage estate.

Mortgage.

If the rights of a jointress have been before considered. I will however observe that a jointress may redeem.

The rule that the wife's claim is paramount -
to that of the mortgagee holds as to a settlement resting
in articles only. & after articles made before marriage
the husband mortgages to one party, & no notice of these
articles, the wife may redeem. ^{No.} if he has answered her p. Dec 22
he would have been postponed. But if he has no p. Dec 30
notice his claim is as prior to hers since he has the p. Dec 31
same title. But if he has notice he & would in law
have equal equity, & the wife would therefore hold in
preference

If a first mortgagee makes a further loan upon his first security without notice of an intervening purchase he will hold for that subsequent loan against the property, for he will then have equal equities & the legal title.

A jointure settles in an \bar{E} of her after marriage, & if merely voluntary is not a good a subsequent mortgage even tho' he had notice of the jointure. It must however be made after marriage or before it will be construed as in consideration of marriage, but by some circumstances it may be for a valuable consideration after marriage, as if it be made in consequence order to have an estate settled upon him.

Real Property

Mortgage

Wife's interest in her husband's mortgaged estate.

If a husband before marriage gives the wife a bond agreeing to loan her a certain sum, she upon his death, it is said may redeem as a creditor.

This rule must be taken with certain limitations not that she can redeem in all cases but that she as a creditor may redeem under those circumstances under which bond creditors can redeem.

If the husband upon a loan of his own money takes a mortgage in the name of himself & wife she is entitled to the interest by survivorship if there be a wife. He pays the debts. For her interest is a mere gratuity, and as such is not good against creditors, tho' it is against his personal representatives.

It is now settled in Eng. that the wife is not entitled to dower in an Eq. of Red. and therefore upon the death of the mortgagor she cannot redeem as dower. This rule as before observed is not founded in principle. The same objection is now easily met did at the time the rule was made.

* There are two opinions against this rule but they are not law.

This rule contemplates a mortgage made before marriage, for according to a preceding rule a mortgage made during coverture will not affect

2 Vern 583
2 H. Bl. 504

2 Bac 129

5 D. 584

1 H. Bl. 504

3 P. W. 229

1 H. Bl. 138

2 H. Bl. 125

1 H. Bl. 138

1 H. Bl. 131

1 H. Bl. 226

2 H. Bl. 399

1 H. Bl. 131

2 H. Bl. 400

1 H. Bl. 131

Real Property

Of the wife's interest in her husband's mortgaged estate.

Mortgage

the right of the wife to dower.

12892

In Connecticut however by a statute a mortgage made by the husband alone during coverture, will hold in preference to the wife's right of dower. But it is otherwise in Massachusetts and New York

Now, on the other hand it is settled in Connecticut ^{that she} is intitled to her dower in the Equity of Redemption.

And it is a rule in England as well as Connecticut that a wife is entitled to dower in the reversion of a mortgage for life or years. Thus suppose, a husband before marriage mortgages his estate for 20 years, R. Ch 133.
2 Vern 400. the wife is entitled to dower in the reversion of the fee.

Now this is properly a right in the reversionary interest after the term has expired & not in an Equity of Redemption.

And if the mortgage is paid up a bill of Ch will in some way or other remove the obstacle to the wife taking the estate.

Of mortgages by Husband & Wife of her freehold.

A husband by marriage gains no other interest in the inheritance of his wife than a freehold during their joint lives or at most a freehold for his own life after her death. When he becomes tenant by Estey.

Real Property.

Mortgage.

Prop 251.
 4 Burr 57.
 2 P. W. 127.

It follows then that he cannot make a mortgage of his wife's estate, which shall bind his wife and her heirs for a longer period than his own life.

Thus if he mortgages her estate for 500 years the estate determines at his death, and it is the same if the wife joins in the deed, unless she joins in buying a fine or suffering a recovery &c.

Atton 215.

In Connecticut however the husband may mortgage or even alien her land if she joins in the deed, the deed having the same effect as the fine or recovery in Eng.

Comp 201.
 100 J 154.
 2 P. W. 127.
 2 Cox 526.

As to the question what acts of the wife will amount (after coverture determines) to a new grant or rescission, of the grant of interest by the husband, see the authorities here quoted.

Real Property

Mortgages of the wife's freehold.

Mortgage

If the wife has no power to convey
 the husband's debt his personal estate is to be applied to the
 mortgage of his estate. So that if he dies the wife takes a
 claim upon his personal representative to discharge the debt to
 the extent of his act of her & those claiming under
 the statute of distributions but also to legacies. That is
 her claim is superior to that of all volunteers she is
 considered as a creditor.

18. 11. 1792
 2 Term 1804
 501

38

If the wife joins in conveying her own
 estate as agent in ^{of the husband} ~~conveyances~~ ^{not}, she is considered as
 in a third place as in the place of the mortgage, & entit-
 led to his debts. For 'as she has paid a debt to disem-
 power his estate she is considered as having purchased
 the mortgage.

If a feme sole been a mortgagee married, her
 husband is entitled to the mortgage as he would be to her
 own in action, provided he reduces it into possession den-
 ing coverture. And in general any act by which he converts
 it to his own use, will be considered as converting it to
 propriety.

18. 11. 1792
 2 Term 1804
 502
 503

But an alienation or assignment of
 the wife's mortgage is not redemptive of her redemption
 unless the wife, or her assignee, for a valuable con-
 sideration.

The husband if it true was made
 the mortgage of his wife has never been set aside
 unless it is gratuitously given to her estate.

18. 11. 1792
 2 Term 1806
 504

Real Property

Mortgage Mortgages of the wife's freehold.

P. W. 458
20 197

If the husband's creditors obtain possession of the wife's mortgage so that she is obliged to resort to a Ct of Eq for relief the Ct will not interfere on her behalf. "In case of insolvency before the husband became bankrupt the creditors could have taken it by execution, & he might have made an assignment of it."

The Ct of Eq here appears to consider the equity between the wife & the creditors to be equal and they having the legal title their claim will prevail.

{ P. W. 452.
453.
20 210.

But if in that case the wife had possession of the mortgage deed at the time the husband became bankrupt, & the creditors apply to Ct for relief they will not interfere for the same reason, viz the equity on both sides being equal and she having the legal title her claim is superior.

{ P. W. 452.
201.

Mr. Powell suggests a query whether the Ct would not interfere in the last case if the creditors would make a reasonable provision for the wife. I think not.

2 Barb 210.

But Eq will interfere in favor of the wife against a specific assignee against the wife & demand her to resign the mortgage deed at the law on her possession.

In answer to the husband's assignee the wife's mortgage ^{as} ~~was~~ ^{is} treated for a debt due to the wife and the wife is entitled to the amount.

Real Property
Of the funds for redemption.

Mortgage.

of the debt secured. Now the person thus holding the mortgage will hold it until the debt is paid, & if the husband dies the wife may redeem by paying the debt.

2d 232
2d 232

But as to real estate mortgages are to be redeemed.

The general rule is that the fund which has been encumbered by contracting the debt is to be first applied to the discharge of it.

Hence on the death of the mortgagor, his personal fund is liable, and if he leaves personal assets sufficient to pay his debts the executor may be compelled to advance his fund to the redemption of the mortgage.

2d 232
2d 232
2d 232
2d 232
2d 232

This rule presupposes that the mortgagor has not manifested a different intention. For it is certainly optional with him out of what fund it is to be paid.

In the case however where the personal fund is liable, the heir is liable to be sued upon the debt, but he can compel the executor to discharge it.

2d 232

The first general rule with the executor holds also as to the devise of the mortgaged estate, but it is he is in the same situation as the executor, and may compel the personal representative to advance from the personal fund to a discharge of the redemption.

2d 232
2d 232

From 1810-1811
 1810-1811
 1810-1811

497
 Call 54.
 2 Bern 101

These rules, in favor of the heir & reverse of the Eq of Rio even tho the mortgagor has bequeathed his whole personal property to others. For the mortgage is a debt. It is under however that this rule will not hold with regard to general legacies in contradistinction to ordinary legacies. For the term general legacies is not there intended as a term than ordinary legacies. This is the usual satisfactory sequence I can gain from the books

I must here again observe that this rule obtains only in those cases where the testator has not manifested a contrary intention. These rules then of claiming & marshalling assets hold only where the testator has not manifested a different intention.

And tho the testator expressly charges a real estate with the payment of his debts, the real is liable only in case of deficiency of the personal. These rules apply only as between the real & personal representatives of the mortgagor & do not affect the right of his creditors for they can at their option come upon the personal or real estate. If however the charge is made in such a form as to imply that the real estate should first apply, it will be.

51.
 121 213.
 2 Bern 18.
 0 Bern 45.
 1 Bern 291

Suppose then a mortgagor says that I give my real estate to the payment of my debts & the residue to my heirs & assigns

Bank for redemption

Mortgage

will be applied to first in the redemption.

That is, he says, "since my real estate is sold for the payment of my debts the real estate will be applied for that purpose."

And the rule that the personal fund ^{is to be} applied to discharge the real estate ^{is to the prejudice of} simple contract creditors or legatees. ^{general}

The rule will hold however against the ^{general} executor + against residuary legatees. ^{as in 30.}

Suppose the mortgagee has no simple contract and has creditors + the latter resort to the personal, how can the above rule be carried into effect. The Ct. of Ex. will decide that if the bond creditors exhaust the personal the simple contract creditors may come upon the real estate. ^{Halifax 1844.}

And the same rule applies to ^{James J. P.} of general legatees the not of residuary.

There is a variety of distinctions as to the marshalling after as between legatees and as between or other, they will in general be considered.

On the other ~~of the~~ hand the law of the mortgage is not subject to the aid of the personal fund as against a specific legatee.

With regard to what is a specific legatee observe that it must be clear and certain & well defined, otherwise if it is not definite it will distinguish it from all others of the same kind. It will not call under the description of a specific legatee.

Real Property

Mortgage

Dwells.

1859

2 Ves 422.

If a man borrows £10,000 dollars, and is not given specific security, but if he says to the lender, "I am now in need of money, and I will give you a mortgage on my real estate," the lender will not be bound to take the mortgage as security for the loan.

The mortgagee's devise his estate in these words, with the incumbrances thereon, if there are no other words showing an intention that the mortgagee should take the estate same as he will be entitled to the use of the personal funds in discharge the real estate.

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On the other hand if there appears upon the face of the will that the mortgagee should take the estate free of all incumbrances then as well as personal estate will be taken. For the purpose of a portion in the redemption. If the mortgagee specifies the mortgagee of the mortgage upon the latter's death has claim upon his personal estate to aid in the redemption.

1859

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The general conclusion of the above rules was that that fund out of which the debt was discharged must be that which was increased by the mortgage, but this is directly reversed in the case of the mortgage since the fund out of which he secured the mortgage is thereby decreased.

1859

The same rule holds for the same with the devise of the mortgagee,

Real Property

Interest

Mortgage

Again if the sum due upon the mortgage is not properly the debt of the owner of the Ego, his personal assets are not liable. His personal funds are not supposed to have been benefited by the mortgage; he was not the borrower.

10th 347
17th 348
4th

Of the Interest of Money secured by mortgage ^{17th 348}

The rate of lawful interest in England is 4 per cent. In the U.S. it is 6 per cent. In N.Y. it is 7 per cent. In most States 6.

It is said by Lord H. that if the mortgage is drawn for 3 per cent & the 6 is received that the mortgage is void. This is not however law. The receiving more does not make it void, but voidable. It was originally made to receive 3 it would render it void ab initio. It is never laid down the rule but upon the supposition that there was an original agreement to receive 3. I have also been told by Lord H. that a contract made in England for a mortgage of land in the U.S. at an usurious interest in England is void, tho' it does not exceed the proper rate of interest in the U.S. I doubt that only however void if the terms of the contract require it to be paid in England.

2nd 347
3rd 348
4th 349
5th 350
6th 351
7th 352
8th 353
9th 354
10th 355
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99th 444
100th 445

I think it to be a general rule that a contract is not usurious, if the rate is according to the laws of the place where the business is to be made.

A contract is unlawful or void, when the performance of it is unlawful & it is made a contract in law to be in thing which is in law which is here lawful the act is lawful. It is so because that any contract will be good as to its performance an act out of the jurisdiction of law and lawful in the place where it is to be performed.

Lecture

July 2^d 1818.

6th 1818.

3rd 1818.

2nd 1818.

11th.

18th 1818.

There is an established distinction in law between a condition in a mortgage reserving 4 per cent interest with a clause of increase or 5 if the interest is not punctually paid, & a condition reserving 5 with a clause of reduction or 4 if the interest is punctually paid. The latter agreement is binding; the former not, in either in the nature of a penalty.

This example presents one of a few points which occur in law, because they are established by precedent. In substance the contract is perfectly the same in both cases, & those who are accountable with the mortgagee must answer according to the first form mentioned.

But it is well settled that the agreement to pay the additional interest being in form of a condition will be enforced.

And a condition reserving an additional sum in the form of a penalty will be void in law if it is unreasonable. If there is an advantage granted to the mortgagee, as in the case of interest.

18th 1818.

2nd 1818.

Real Property

Interest.

Mortgage.

for this is in the nature of liquidated damages
 & is in the form of a penalty.

Interest upon interest is regularly not at
 law. This rule holds in law and equity. And an
 express agreement to pay it will not be enforced.

But is for the protection of debtors.

But if the mortgagee assigns his interest
 with the consent of the mortgagor all the money
 paid on the assignment & which was due by the
 mortgagor at the time of assignment & will draw in
 interest. Here the interest due at that time draws
 interest.

The assignment with the concurrence of
 the mortgagor implies an agreement that the af-
 fignee shall pay the mortgagor's debt. And this
 is the reason of the rule.

But if upon such assignment the af-
 fignee don't pay the money, but the agreement is
 merely colourable to load the mortgagor with con-
 joint interest, the interest due will not carry
 interest.

But this assignment to entitle the af-
 fignee to interest on interest must be with
 the concurrence of the mortgagor. And this
 supports the reason I have given above for
 the rule there given.

Real Property

Mortgage

Interest.

2 Burr 182.
 10 Ch 114
 2 At 331.
 2 At 352.

It was once held that the mortgagor on a limited mortgage should pay compound interest. But this as a general rule was soon exploded.

453 }
 10 Ch 473.2
 1 At 379.
 3 Ch 500.
 5 At 422.
 2 Eq B. 530

But a report of a master in Ch^y computing interest under that interest principal from the time of the report confuses. For this is equivalent in effect to a judgment at law. And a just debt always draws interest, or converts it into principal.

2 Burr 292.
 10 Ch 25.
 12 Ch 118.
 2 At 350.
 1 At 102.

But the report of a master in Ch^y to foreclose a mortgage does not regularly carry compound interest. Because one reason why compound interest is ever allowed is that the mortgagor has been in default. But this is not imputable to an infant.

1 At 102.
 449.
 1 At 145.

But if an infant is plff in Ch^y to redeem, on an account taken by the master, interest will be allowed on the whole amount. For the lft is allowed the whole benefit of equity where he is brought there by an infant lft.

1 At 375.

And if an infant entitled to an equity of redemption agrees to pay interest upon interest & thus procures a benefit to himself, the contract will bind him in Equity though not in Law.

1 At 284.
 2 At 215.

As where an infant had no other means of support and agreed to pay compound interest, he was permitted to remain in possession & did remain. He was bound by the contract.

But a mortgagor merely gives an account

Real Property

Interest.

Mortgage which makes compound interest does not oblige him to pay it. It is not an express agreement & for this reason will not be enforced. For this regard these agreements in a great measure.

From what has been said results this leading principle. An agreement at the time of the mortgage make not turn interest into a debt & principal is not due. For this would open a door to oppression. But when interest is due it may by agreement be turned into principal and carry interest. This is allowed for the interest of the debtor upon forbearance of the creditor.

I have formerly observed that tenant for life of an equity is compellable to keep down the interest. But a tenant in tail in possession is not compellable by the remainder man, reversioner or issue in tail.

For this there are two reasons. One because the tenant in tail may doct the entail & thus those who have only an expectant interest will be barred. If then the tenant is compelled to keep down the interest, it may finally happen that the person compelling him to pay the interest will have no right. But another reason is that the tenant in tail may continue forever, & so the interest expectant is too remote to demand a decree in its favour.

Real Property.

Mortgage

Interest

12th 57.
15 224.
16 377.

Still however if the tenant in fact is an infant & his guardian in possession the guardian may be compelled to keep down the interest.

For the infant must bear the interest in coparcenary, unless under the spring real & that is not allowed of course.

12th 57.
15 224.
16 377.
17 424.
18 424.
19 424.

But if a tenant in fact does keep down the interest, the remainder man or his representative will have the benefit of it, And they will not be compelled to reimburse it.

12th 57.
15 224.
16 377.
17 424.
18 424.
19 424.

Now if where there are more mortgages than one; If a first mortgage having taken possession permits the mortgagee to take the rents and profits without paying the interest, still in favour of the second mortgagee the profits shall go to discharge the interest of the first mortgagee.

12th 57.
15 224.
16 377.
17 424.
18 424.
19 424.

Here a bond is given to the mortgage, the holder of it being fully possessed of it has a right to collect the whole debt interest & principal. For he may deliver up the bond. But the holder of the mortgage deed has no authority to receive any more than the interest. For a redemption of the deed does not reconvey the title. Now as the holder of the debt has the evidence of the title he may acquire possession & so take the rents & profits. He may for this reason take the interest without getting possession.

Real Property

Tender of the money.

Mortgages

If the mortgagee refuse to receive the money, ^{Eq Ca Al} due, & tender is made to lose the interest on the debt ^{14. 19.} from that time provided the mortgagor gives ^{calendar} 8 months notice of his intention to pay, & pays on the day appointed. He must give notice because the legal title is now gone.

But the mortgagor must make oath in ^{2 B. W. 378.} that he practices that the money has been always ^{2 B. Ca. 205.} ready for the mortgagee since that time, & that he has made no profit of it, or else the interest will not stop. For this is equitable. The mortgagor has not otherwise lost any thing by the mortgagee's refusal to take it. And the tender to ^{2 B. Ca. 508.} stop the interest must be a strictly legal one.

There has been some litigation in law ^{1 B. Ca. Al} & equity, how far the tender of a bank bill is ^{516. 18.} good. The rule seems now settled in both Cts. ^{1 B. Ca. 339.} It is now where the creditor makes no objection, ^{Day 562.} on the ground of it's being in bills, & especially ^{553.} if the creditor offers to change it & get specie. ^{2 B. W. 352.} And this last qualification is now unnecessary. ^{2 B. Ca. 328.}

The money due upon a mortgage is ^{2 B. W. 387.} nearly to be paid tendered to the person of the mortgagee, if no place is appointed in the contract. But if a time & place are appointed payment must be made accordingly. ^{2 B. W. 387.}

But if no place is appointed in the contract, & the mortgagor appoints a place & gives

Real Property.

Mortgages

Mode of taking the account.
 P. 237⁸ notice, tender there is good, if the place is reasonable & the mortgagee does not object at the time notice is given.

As to present any notice it has been determined, that tender at the mortgagee's house in his absence, is in some cases sufficient, i.e. if it can be proved, that the mortgagee willfully kept out of the way, to avoid a tender.

On the other hand however, if the mortgagee has doubts as to any legal question respecting the tender he must have time to consult counsel before the interest will stop.

Is also if there is a question as to whom the eq. of red. belongs, he will be allowed the same time to consult counsel.

It is said in the books that the interest accruing upon a mortgage may be altered by a subsequent parol agreement. Powell lays down the rule generally. But I doubt whether it be who wants to enforce the agreement is pl. The rule holds. If he is dt. there is no doubt, for an equity may always be rebutted by parol proof. But the equity arises upon a written contract.

Mode of taking the account.

A mortgage being a mere pledge the mortgagee is not entitled to the profits till he takes possession. He has the legal title and is all. When the mortgagee remains in

Real Property.

Made of before the receipt. Mortgagee in possession. He is not to account an redemption for the rents & profits. He must allow interest on the debt.

But the mortgagee must account for the rents and profits received during his possession i.e. there are 2 Bk 282. P. 404 to be applied to the debt and interest.

A mortgagee in possession is entitled regularly to no allowance for his care & trouble in taking care of the estate. But by this cannot be meant that if he labours on the estate he is not to be allowed pay for it. All the expence of raising the crops must be deducted. But the mortgagee is not regularly allowed any thing in the nature of a salary, & this even if there were an agreement to the contrary.

If the mortgagee in possession assigns to an unincorporated person without the mortgagee's consent, he still remains liable for all the rents and profits even after assignment. And this rule is no harder than the Bk rule where the assignee assigns. He is still liable on his covenants. 16, Ca. 328. 2 Bk. Ca. 2. 3 Bk 588.

The mortgage is answerable to the mortgagee only for the actual profits received & not as the case may be for the annual value unless it appears that he might have made more money & had been guilty of fraud or wilful neglect. 16, Ca. 328.

But if the mortgagee takes possession & keeps

Real Property.

Mortgager. Made of taking the acct^r after creditors and he will in their favor be charged with all the profits he might have made. And this is the rule even if he permits the mortgagor to take the rents & profits. If he permits the mortgagor to do this it is called fencing.

1 Bk Re 209.
R. M. 469.8.
2 R. & Chan. 204.

In the last case however the mortgagee is not accountable for the profits to the subsequent encumbrancer, before he knew of this subsequent encumbrance. Here there is nothing unfair in his conduct.

1 Vern 267.
2 Bk Re 267.
3 Bk Re 688.
O. M. 469.

But here if the mortgagee permits the mortgagor to remain in possession, he having notice of the subsequent encumbrance, he is charged with all the profits, that they might have made from the time of his interposition.

1 Vern 267.
3 Bk Re 688.
1 G. Ca. Abr. 504.
R. M. 471.

If after an assignment by the mortgagee the mortgagor brings a bill for redemption, the mortgagee must still be made a party; for he must account for the rents and profits he has received. But this rule holds only where the mortgagee has been in possession.

1 G. Ca. Abr. 12.
3 Bk Re 689.
1 Bk Ca. 299.
2 G. Ca. 32.

Where there are several encumbrances, an account stated between the first mortgagee & the mortgagor will be conclusive as to the amount, unless the subsequent encumbrancers can shew some fraud or unfairness. The burden of the proof lies on them for the mortgagee is entitled to the profits & if an error is incurred it is the mortgagor who will of course take care of himself.

Foreclosure

Mortgages

But an account between the mortgagee and his assignee will not prima facie conclude the mortgagee. 8 M. 23.
 For the mortgagor is entitled to the profits. See 1 Bl. 68.
 He would then have been a party is not bound prima facie

An assignee after several assignments is not in Bl. 682.
 general bound to account for profits before his own time. 2 Bl. 392.

The amount of this rule is merely that the profits are not to be taken into the account as against him, but the mortgagor is not to lose them. They are to be set off against the previous ^{interest} ~~amount~~.

There are two modes of taking the account

One of them is by making what are called annual notes or by applying the annual surplus of the rents & profits over the interest to sink the principal.

2 M. 504.

The other is by bringing all the profits into one aggregate and all the interest into one sum. The former mode you perceive is much the best for the mortgagor where the rents and profits exceed the interest.

The rule to decide when one mode is to be adopted under the other, is this. If the annual rents & profits considerably exceed the interest the first is used, if not the latter. R. 8.
 2 M. 532.
 O. M. 374.

Foreclosure

As the Ct of Ch. will or will not decree a redemption in favor of the mortgagor, so as the other they will in favor of the mortgagee decree a foreclosure. And it would be monstrous if after the Ct has created an equity, it should refuse forever to extinguish it. 2 M. 198.

Real Property.

Mortgages.

Foreclosure.

Ole 475
2 Inst 198

The decree of foreclosure is merely an order from the Ct, that unless the mortgagor redeems in a given time he shall be foreclosed forever from redeeming.

1 Br Ch 368.

If a mortgage is made to several, all the mortgagors must join in a petition for foreclosure. So if the mortgagor signifies to two or more, more they must all join in a petition. And Equity will never settle part of the case without the rest.

1 Den 368.
1 Den 232.
11 M. 31. 84.
15. 472.

A Ct of Equity can never decree a foreclosure till after forfeiture. For untill that time the equity of redemption does not exist. And by a foreclosure the equity of redemption is merely extinguished.

11 M 470.
2 El Ca 244.

It is a rule as expressed in the books, that on a bill to foreclose the title of the mortgage can not be investigated. This language does not express the rule intended. For the mortgagor may say that the person applying is not entitled to the legal estate. The meaning of the rule intended I take to be that Ct in a bill to foreclose, will not aid the title of the mortgage. The decree to foreclose does not create a title.

If the mortgage's deed is defective Ct will aid him, but not on a bill to foreclose. It must be done on a bill filed for the purpose.

244.
202.

A mortgagor may at one and the same time pursue three remedies as the mortgagor by so many several suits in action.

Foreclosure.

Mortgagor.

He may sue in debt so on the bond; he may maintain ejectment to obtain possession, and bring a bill for foreclosure at the same time. And there is no deviation from the rule of law, that the party is not liable to two or more suits at the same time for the same cause. The object and object of all these three remedies are different.

And in Court where an equity of redemption is legal after the mortgagee having recovered in his bond may have an execution against the equity & have it set off.

The Ct of Ch^y may refuse to foreclose, when manifest injustice would be the consequence of this decree. For their interference to enforce an equity is discretionary. Not so in a Ct of Law where the claim of the party is stricti juris. 2 Varr 271. 2 Bk 682. O. Ch. 478.

Upon reference to a master in Ch^y to take an account on a mortgagor's bill to redeem the master does not redeem according to the order and in consequence of this the Ct dismiss the bill, this is equivalent to a foreclosure. 2 Att 207.

If the mortgagee's heir brings a bill for foreclosure it is good cause of demurrer that the executor is not made a party. And even if there is no demurrer, & these facts appear on the trial, the bill will be dismissed. 2 Bk 29. O. Ch. 479.

But the mortgagor's executor need not be made a party in a bill by the heir. 2 Bk 333. O. Ch. 482. to foreclose when the mortgage is of an inheritable interest.

Real Property.

Mortgages -

Foreclosure.

For he has no interest. But if the equity of redemption is of a chattel interest the execution must be made a party.

2 Vern 66. But if the mortgagee's heir does obtain a decree to foreclose no objection being made he may hold the land if he will pay the execution the money due. though the latter was no party.

2 Vern 67. But if he does not pay it, the execution may in Equity compel a conveyance to himself of the estate.

In a decree to foreclose unless pay-
2 Eq Cases 605 ment be made within a limited number of months the calendar months are implied.
the common period limited in Eq. is six months though the Ct. are at liberty to limit any other period

August 5th 1850.

Real Property

Mortgage

3. 1. 143.

This day by the English practice is
preserved in the infant by the terms of the decree.

It is not I believe usual to except
this reservation in bar but if the claim be not
included the day is nevertheless allowed.

If the infant does not show cause
within 6 months ^{after coming of age}, the decree which is originally con-
ditional is made absolute.

2. 8. 143.

2. 6. 143.

2. 4. 143.

2. 1. 143.

2. 1. 143.

But when he does show cause he
may make a new answer and a new defence in motion.

But it is no doubt he must show that
an error was made when he has obtained judgment, or set-
aside the decree, because it was against him when
an infant. But he must show that the decree
was erroneous or unjust & wrongfully obtained.

2. 1. 143.

2. 1. 143.

2. 1. 143.

2. 1. 143.

The amount of the rule is that after
the infant obtains full age & within 6
months he may take advantage of any reasons
which existed at the time of the decree, &c.
which if then known ought to have prevented it.

But if a feme sole or her executor
has mortgaged land & the Equities rest in her hands
if coverture is a bar for foreclosure & redemption
no day is allowed her on the score of coverture.
She has voluntarily delegated her right of acting
to her husband.

2. 1. 143.

2. 1. 143.

2. 1. 143.

10. 1. 143.

10. 1. 143.

Mortgage

But the law is given her by the re- 2nd 11 40th
 one, and it seems that what evidence determines the 8th 11 40th
 may arise if she has a part owner, as collusion between the mortgagee and
 husband.

If a mortgage is made of an estate
 and a receiver is appointed a foreclosure
 the Ct will open it if ~~there~~ will revive the
 Equity of Redemption.

A mortgage obtained a bill of foreclosure, the 3rd 11 40th
 and pending a suit of the creditors of the mortgagor, the 3rd 11 40th
 for a sale of the lands for the payment of their debts, the foreclosure was opened by the Ct. the 5th 11 40th

It also where the mortgage has obtained
 a foreclosure, after the judgment creditor, and
 the mortgagor had given him notice of
 their demands & tendered payment, the foreclosure
 was opened.

Where a foreclosure is obtained in favor
 of subsequent encumbrancers, the first mortgage is
 entitled to a reimbursement of the expenses of
 the foreclosure. This rule cannot hold if it should
 where the foreclosure was unjustly obtained.

The time limited for payment of the
 debt - a decree to foreclose may sometimes be
 delayed. And it has been enlarged for no other
 reason for no other cause than that the state
 was so valuable for the debt.

Mortgages

10th Jan 1801
2d Jan 1802

Enjoined a foreclosure has been a fore-
several times in case of great hardship, but that is
no more.

10th Jan 1801
11th Jan 1802

A foreclosure was also ordered in England
the grounds that just before the time & during it
there was a civil commotion.

But undoubtedly where a mortgage
accords with the redemption, the foreclosure will
be granted.

But it seems that a foreclosure is never
ordered in favor of a mere volunteer claiming
the Gap, but in equity, because it is said that the
mortgage has legal equity & the legal estate.

It is not the reason of that rule, nor
is a devise or a devise entitled to the benefit of
a foreclosure as well as the heir at law. Espe-
cially of a devise or to a child. I cannot re-
member myself that the rule would extend thus
far. Nor do I think that the reason will
sustain the rule even in a stranger devise.

2d Jan 1801
10th Jan 1802
11th Jan 1802

In a mortgage there can be no
foreclosure for there can be no foreclosure.

2d Jan 1801
10th Jan 1802
11th Jan 1802

The first mortgage having obtained
a foreclosure against the second, the first or devise
the land is the mortgage, the ^{first} ~~second~~ mortgage of the
second mortgage is not factually received.

Real Property.

Foreclosure.

Mortgages.

If a mortgagor after having obtained a foreclosure against the mortgagee after bringing an action upon his bond secured by the mortgage, the foreclosure is opened at the commencement of the action.

It was determined in *Car* that a foreclosure obtained by the mortgagee with possession of the land was a satisfaction of the debt. This is obviously very unreasonable, & I wish not law.

A foreclosure is never obtained unless the mortgagee has acquired in the possession of the land for several years.

According to the *Car* practice of the mortgagee does not pay at the time of foreclosure. He is liable to foreclosure. He is liable to foreclosure. He is liable to foreclosure. He is liable to foreclosure.

That decision is in the practice in the same rule is observed but the same principle is not sound. The decree is alternative, and no subsequent order is necessary to render it absolute.

Manner of acquiring Real Property.

General view by Mr. T. Barlow.

Property is acquired by descent and purchase. When a man dies seised of a fee simple or tail, in the former case without a will, or in the latter with one or without one the land descends to the heir.

If it is a fee simple it goes to his heir. If it was a general fee tail it vests in the same person. But the entailment may limit the descent to a particular heir. These are all the descentible estates.

Purchase means the acquisition by any other means than by descent, whether it be by deed, bargain, or any other way.

45 Originally land was not descentible, assignable, nor devisable. The kings or leaders among the barbarians had a power of parceling out to their lords (and then to their tenants) of conquered countries. But the holders had merely an estate at will.

The next step was to grant terms for years. But these were only for a short limited time. It then became customary to grant for life. And for a long time this was thought to be the greater grant that could be made of lands. And hence arose the maxim, that a grant of lands generally passes a life estate only.

Eventually the word heirs was introduced in order to convey a descentible estate. But still it merely descended to him whom the word heirs was held to designate, that by the old law was the eldest son, or youngest, in the first place. But no one was

Real Property

General view of the mode of acquisition -
 seen to be heir but the lineal descendant of the first
 purchaser. And this is still the maxim. But it
 is evident that this would soon let in collateral
 relations. As if the grandfather was the purchaser
 and the grandson had no lineal descendants, when
 he died seized of the estate. But he had a first cousin,
 & he being at the instant of the first purchaser
 might take. But if no heir of the blood of the
 first purchaser could be found, it escheated.

Now to prevent the escheat they introduced
 a fiction of law that the estate came from an
 ancestor of the actual first purchaser and thus
 all collateral relations were admitted.

This was a sore thing to the great barons.
 So they introduced the word heirs of his body, by
 this intention to prevent the collateral heirs
 from taking.

But finally estates became alienable, &
 then the word heirs became a mere description
 of the quantity of the estate. And then an estate
 to a man & his heirs gave the absolute estate.

Now for a long time the words heirs of the
 body were held to bar this power of alienation.

But finally the Ct. held that an estate given
 to a man & the heirs of his body, was a
 fee simple conditional, to be absolute on the
 birth of an heir. The birth of an heir then
 made the estate absolute.

Real Property.

General view &c.

Finally, the stat de donis conditionalibus was obtained, which was made to prevent the alienation of entailments & make the estate go for form only.

But this is evaded by a fiction which allows the entail to be docted. But if not docted the entail continued.

Next part of the estate was made liable to creditors. The doctrine of execution has been considered.

Finally estates were made devisable. All estates held in fee simple except those held in joint tenancy were made devisable by stat Henry 8th. Brothership without actual beisin either by himself or his servant did not warrant a devise. But it will here.

But besides that all estates in fee simple not excepting joint tenancy are here devisable, & all real property is in most of the States devisable. vide App. p. 1

Men were always accustomed to devise away their personal property, & it may seem strange that devises of land were not sooner introduced. But there was a power over the landed estate.

A man would convey away the estate to his own use, & thus use he might devise tho he could not devise the land.

Real Property

General view &c.

There was no law against this & Ch^{ts} would enforce the devise. And this was a very general practice in the time of the quarrels between the houses of York & Lancaster, for those uses were not forfeitable.

But the 27 Henry 8th prevented this by determining that the common use should have the land. & devise then of the use conveyed the land. This prevented devises of uses. And five years after the stat of devises was passed. But that stat required the deviser to be in writing, & that is the principal requisite by that stat. No other have since required in other things.

By C.L. there is no provision for the disposal of estates per antea vie. The stat of 27 H⁸ determines the manner of it's disposition. What becomes of the estate in those States, where there is no similar stat. It could not escheat for the whole feud must escheat if any. It is hereditary tenure & the first occupant holds it. It could not go to the executor for it is real property. In Eng it goes by the stat to the executor as personal property.

The term "of the blood" is used in almost all our states in a different sense from that in the feudal doctrine of descents.

Real Property

Stat Ch 2nd

Here it means lineally descended, here only of him to the decedent.

The principles of the Stat Ch 2nd respecting the distribution of personal property, are the basis of our laws of descent of real property. And a knowledge of those principles is absolutely necessary to understand the laws of descent in the different States.

Previous to the revolution the descent of real property was the same here as in England since that the system has entirely altered.

45. There are certain terms made use of in the Stat of Ch 2nd, & these when used in our laws are to be understood in the same sense they are there used. And all terms when used in our laws are to be understood as they are interpreted by the Eng. Law.

As in the Stat of Ch 2nd the term of her is used when we use it we are to take the English interpretation of that term.

By the 22 & 23 Ch 2nd, it is provided that when a person dies leaving personal property one third of it shall go to the widow, & the residue to the children or their legal representatives.

This distribution is always per capita when the heirs are in equal degree. But if some claim as representatives then they claim per stirpes. And our laws of descent distribute the real

Real Property

Stat of Distribution
 property in the same way. If there is no widow
 the children or their legal representatives take
 it all. If some of the children are dead un-
 lease grant children, these grant children take
 per stirpes i.e. what their ancestor would have
 taken. But if the children are all dead, they
 take per capita each an equal share.

The term next of kin is used in the
 stat of Ch^s. But who are the next of kin for
 they are to take if there are no children nor
 their representatives.

What mode of computation is to be
 used? Some of our stat^s of descents direct the
 mode of computation by the civil law, others
 by E.L. Now many give no directions as to the
 computation, and there the term is to be under-
 stood as in the Eng law, & there the computation
 was by the civil law. That is the use of it
 in the Eng law or used in the stat of Ch^s. That
 then is to be the mode of computation here.

For cases distributed under the stat of
 Ch^s 2nd see the title of Executors & adminis-
 trators. To find who are next of kin count
 up to the common ancestor, & then come down
 to the person who claims as next of kin.

The deceased is always to be taken as
 the propounder.

In the descents line representation

Real Property

Stat of Distribution

goes on &c. But in the collateral line representation goes no farther than brothers' & sisters' children. But in some of the States, the land in the stat respecting descents goes by an express clause ad infinitum in the collateral line of representatives.

But by the stat of 1828, the mother is degraded to the second degree, provided there are brothers or sisters living. And some of the States as New York have provisions of that kind, as it respects descents. If there are not the mother or father, the whole to the exclusion of the brothers and sisters.

In Massachusetts, tho' the claimants are in the same degree those who claim thro' a more remote ancestor cannot take. And this is then only alteration of the stat of 1828.

In all cases the principles mentioned govern with one exception which I will presently mention.

Unless there is some provision in our stats, the half blood take the same share as tho' they were of the whole blood.

For in computing next of kin proximity and not quantity of blood directs the computation.

This point soon after the stat of 1828 was completely settled. Some cases were brought up to the court of descents. For it is in reference to our

Real Property

Law of Distribution

the decedent, the estate is not subject to the law of the state of the decedent.

But according to some, the half blood from father, an issue in many of the states where the mother & sister are of the half blood, if they are not of the blood of the first purchase, or rather ancestor from whom it came. This is the case in New York. And the same is the case where the decedent was himself the purchaser.

We have a stat which says if the estate came from an ancestor, it shall go to the blood of that ancestor, & further that the half blood shall not take if there are children of the whole blood.

A posthumous child takes a distributive share under the stat of Ch^o. But it is said the distributive share vests immediately, & so the unborn child not being in life cannot take. But for this purpose the child is considered in life even if it is considered as all vesting in the issue alive. There is no doubt in substance a part of it to be received on the birth of the posthumous child & vests in him.

Now come as the states the grandchildren have taken per stirpes where all the children are dead. But this I apprehend to be incorrect, where the terms of the stat are like those in the stat of Ch^o. There was one decision on this point in principle in Bond^t. But it is entirely unsound.

Ch^o 116.
17th & 22d.
2d Nov 716.

Descent.

puted to was made in the time of the war, & is not warranted by law. In that case the brothers and sisters were not dead, & their children took per stirpes.

In the collateral line, accumulation I have observed never extends beyond mother's sisters' children, & the rule might have been general, that in the collateral line, it does not extend beyond the third degree, whether they are brothers and sisters' children or any other relations.

But in the case of grand-parents and mother & sisters still alive, tho' they are all in the second degree yet the grand parents will not take, & this is the only exception to the symmetry of the statute.

If all the brothers and sisters are dead however children the grand parents take all the estate to the exclusion of the nephews & nieces.

In England a man dies without any relation the property goes to the king. But in the U.S. wherever there are states it goes to the Lord Chancellor.

Here the principles are laid down with their authorities, for that see the title of Basset's Abridgment.

Descent in England.

Real property descends to the legal descendants of the person last actually seized. The maxim is *seised facit heirum*. This maxim is designated in most of the States, and owner ship without seized passes over the ~~last~~ heir.

Real Property.

Descent.

2^d. In Eng the real estate descends to the eldest male in exclusion of the younger and of females.

In these states primogeniture confers no such exclusive right.

3^d. The estate goes to the lineal representatives of such eldest son if he is dead leaving issue whether male or female. General principle, seen to have governed in the formation of these rules.

4th. In Eng males always exclude females in the same degree. This rule is here disregarded.

5th. If there are no male descendants, the land descends to the females altogether ^{as} coheirs.

6th. If one daughter is dead leaving children they will take what their mother would have had pursuant to the rule that the eldest male takes & that the females are excluded.

7th. If the intestate died without issue it is a maxim in the Eng law that the estate cannot lineally descend. The next collateral relative must take, provided he is of the blood of the first purchaser subject to the foregoing rules. The half blood in Eng can never take.

But in those states where the G.L. prevails, in the collateral line the half blood are not entirely excluded.

In Sweden, collateral relatives the paternal line is preferred, unless the estate actually came from the mother, & then the collateral

on the paternal line can never inherit.

Suppose both the daughters are dead and issue, then their issue can never step by the way line of descents.

But had no issue. Then no more to be seen with this estate to ever descend. On the other place the real estate can never be taken by the lineal descendants by inheritance. The reason given by Coke is that land cannot descend to a collateral.

The next collateral relative must take in case of death of the blood of the first purchaser. But he must be of the whole blood, & then he & his representatives will take.

Well then J. I. died seized of Blackacre & all descended from Kender, & if he bought it, it is supposed to have come from him, he left Sally his sister of the whole blood, & Samuel of the half blood, & he left Thomas a brother of the whole blood. Thomas then will take for he is the next collateral relative of the blood of Kender, and being a male excludes Sally from taking.

But Th was dead leaving a child. That child will take to the exclusion of Sally. But Th is dead without issue. Then Sally will take the estate to the exclusion of Samuel for he is only of the half blood.

But the estate came from Kender. But J. I. was never seized the issue of J. I. cannot take

Real Property

Descents

See as to same, for *semina parva stipulatio*.

The nearest collateral or *real* descendant of kindred if of the whole blood will take the estate.

If the estate actually came from the father, it goes to all his relations; if from the grandfather it may go to any of his relations.

But if it is acquired it may by a fiction go to any kinsman of any ancestor.

But suppose there are no brothers & sisters of the whole blood. Bembur has a brother living, & so has his wife a brother living, the father's brother will take for you minor just but for relatives in the paternal line, unless the estate actually came from the mother.

And the relations in the paternal line tho' more distant, will take the estate & in exclusion of those that are nearer in the maternal line. And you must look thro' all the paternal stocks before you resort to the maternal line.

And in the collateral line the same rules prevail as to the preference given to males & the exclusion of the half-blood.

So likewise females in the same degree take equally, but the oldest male excludes the rest.

Real Property.

Descents

The law of descents in the several states as far as to enable you to understand their statutes.

The term of the blood has two senses.

- 1st The feudal sense is lineally descended from.
- 2^d It means any relation whether lineal or collateral. This is the modern sense, and this is the general use of it. But there are some states, where it is used in its original sense.

The state in most of the states profess to direct the descent of property in all cases.

48.

They say that the estate let it come from whom it may shall go in certain cases to the brothers & sisters of the deceased, provided they are of the blood of the ancestor from whom it came. Suppose the estate came from the uncle, George. Now there are brothers & sisters Tom Dick & Sally. Now there are not of the blood of the uncle in it's original sense. Then if there are no other relations, there is no provision for the descent of the estate. This proves that "of the blood" means any relation.

And this is the use of it in the Eng. But in many cases, as in the stat directing administration to be given to the widow a rest of her. Here rest of her provision signifies, means any relation.

As to the stat of New Hampshire. The words

Real Property

Descents

of it respecting the descending line, are the same with those in the stat of Gt. Of course in the descending line the descent is the same. As to the ascending and collateral line it gives the estate to the next of kin & their representatives. But representation goes only to the third degree. And further if a brother or sister die before me without issue, the estate goes to the brothers and sisters. This is a variation from the stat of Gt. And the mother is degraded to the rank of brothers & sisters if there are any living. And there is no distinction but she is mentioned from the stat of Gt.

Stat of Massachusetts. Here as in New Hampshire it makes no difference whether the estate be purchased, or descen. As to the descending line the rule is the same as that of the stat of Gt. & the deceased need not have been seized. But their stat directs the estate to go to the father to the exclusion of the mother. And if he is dead & there are brothers & sisters living, she is degraded to the second degree according to the stat of James. But in this case if the brothers and sisters are dead leaving issue, those children will not take but the mother will take the whole. This is a marked difference from the stat of Gt. for there the mother is made part of the old stock.

Real Property.

Descents.

The stat of Cal. provides it shall go to the
 next of kin, so does that of Massachusetts.
 But the stat of Mass: provides that among
 next of kin those that claim under a nearer
 ancestor, shall take in exclusion of those who
 claim under one more remote. This is a con-
 siderable alteration. And this with those before
 mentioned is the only alteration of the
 Eng. Law of distribution of personal property.

That of Rhode Island.

All real property in the descending line
 except estates tail go as in the stat of Cal. But
 in the ascending or collateral line the estate
 must go to the next of kin who is of the blood
 of the first purchaser or ancestor from whom
 it came. This is a natural and the only altera-
 tion. And it makes no difference whether the rela-
 tive be of the whole or half blood. If there is a per-
 son who is next of kin go to any collateral relative.

But if it comes by devise or deed of gift from
 an ancestor it must go to the relative of the blood.

That of Connecticut.

In the descending line it is the same as the
 stat of Cal. But in the ascending or collateral
 line it is different. As in a descending estate it goes
 as in Rhode Island except that the father may not
 take. If there are collateral relatives and no
 one of them is of the blood of the ancestor.

Real Property

Descent

As in case of ~~the~~ of the blood, the half brothers & sisters take, or any of the collateral line is not of the blood, if of the next of kin.

If the estate is purchased it goes first to brothers & sisters of the whole blood & then reverts to the exclusion of the brothers & sisters of the half blood. And if the brothers and sisters of the whole blood are dead without legal representatives it goes to the parents. If they are dead without legal representatives, it goes to the brothers and sisters of the half blood & then to the next relatives. This representation is in the collateral line in all the states limited to brothers & sisters children or the their degree.

Stat of New York.

In this the rule in the descending line is the same as in the Stat of Ch.

In the collateral line so far as it respects mother & sisters, they take to the exclusion of the mother. But the father if he is alive will take it. And the relatives, to take, must be of the blood of the ancestor, if it is a descended estate. If it is a purchased estate, it goes as in Rhode Island.

But the brothers & sisters are all dead leaving issue. Here contrary is the Stat of Ch. the estate goes to the issue per stripes, & not per capita. This is an exception of the provision of the Stat of New York in all other cases the Stat of

Real Property

Descents

descend to states place. That Men is necessary to be
 present in descent.

Stat of New Jersey.

This state seems to have been made with
 and reference to that of Ed. It alters the B.L.
 further than that of New York by making
 it unnecessary that the person directly should be
 seized. In the descending line the oldest male
 is not preferred to the rest. And males do not
 exclude females but take a double share.

And this holds in the collateral line, where
 the stat alters the B.L.

The rule is the same as to representation
 as at B.L. They always take per stirpes & never
 per capita. And their stat makes no difference
 as to a person's age, man or a one woman. And it
 makes no difference from whom it come.

If there is no issue the stat provides
 that the estate shall go to the brothers and sis-
 ters. And if there are none of the whole blood
 those of the half blood may take. And here
 the male takes a double share. And their rep-
 resentation will take without any limita-
 tion of representation. And if there are no rep-
 resentatives of the brothers & sisters the estate
 goes as at B.L.

Stat of Virginia.

The same made and express provision to guard
 against the idea that the heir cannot take when

Real Property

Succession

The deceased leaves no issue. Then if a person has left the estate shall go to the children & their descendants, and if they are in different degrees they shall take per stirpes but if in the same degree they take per capita. This I suppose applies to the time when a child is born.

If there are no children nor descendants, then the estate goes to the father. But it makes no difference in Virginia how the estate comes. If there is no father the estate goes to the mother & brother and sisters & their descendants according to the order of birth. The word descendants is used but this means lineal heirs as in the state of New York. Thus far the provision is like Lord's but the half blood except the representative of brothers & sisters take under the mother & sister.

The half blood takes a half share in the estate. They are not excluded or included.

There are some provisions respecting infants which I shall not notice.

But now as to the mother, brother & sister nor their representatives. Then the estate is divided into moieties, one half goes to the mother & the other to the brother & sister.

If goes to the grandmothers & if they are dead then to the grandmothers & to the uncles and aunts in equal shares, & their descendants.

Real Property

Decedent

And thus you proceed till you find decedent and you still distribute in this way & finally in every stage of the descent.

But when the estate is divided into portions, if there are no relations on one side, it all goes to those on the other.

But there are no relations on either side, the whole estate goes to his wife. But his wife is dead, then her relations take it as if it had been hers.

If the relations are of the half blood, they take it all.

Barbards may transmit their estates to the mother's relations. And where they intermarry the children become legitimate. And if there be a marriage de facto tho' it be void in law the issue are legitimate.

But where no relations are found either as the part of the decedent or a wife or her relations, then the estate escheats, to the state I suppose there is no stat provision directing it.

That of Pennsylvania.

This is complicated. In the descending line the rule is the same as in the stat of Ch^s. They take in the same manner. The stat does not mention next of kin but detail at length.

Real Property

Descent.

There are no heirs - but here you must distinguish between the whole and half blood & their children. The father and mother are alive. Here in the first time you find the half bloods even as much as the whole bloods. These are excluded in the other states but not in these giving them the same as the whole blood.

The father takes for life. If the estate is ancestral as then to brothers and sisters of the whole blood, if they are of the blood of the person from whom it came. And if any of them are dead, their issue take it per stirpes.

If the father is dead the mother takes it for life. But there are no brothers & sisters of the whole blood of the person from whom it came. Here by another provision of the stat it goes to the brothers & sisters of the half blood, who are of the blood of the person from whom it came.

Representation in the collateral line is unlimited.

But the mother is dead & the brothers & sisters of the whole blood are dead without issue, & the half blood are not of the blood of the person from whom the estate came. If it is an uncharged estate they take. If ancestral seek the next within of the blood.

If there are no brothers & sisters, nor mother

Real Property

Descent

mother the father takes the fee if the estate did not come from the mother. If the father is dead then it goes to the next of kin & their issue. And here you come to that clause, in which no difference whether they are of the whole blood or of the blood of the person from whom it came. And the next of kin & their issue take & they take per stirpes in all cases.

Our ancestral estate here never descends to the next of kin, until you come to the last clause of the stat. And the half blood are postponed to the whole, even where the estate is acquired as well as where it is ancestral.

But the mother can never take a fee.

That of Mar. 2nd.

It provides for the descent, where the estate is seized. This is the first state that requires seisin. It provides for the descent of fee-simple & tail, (namely after the stat.) These words put in for there is a clause in the stat, preventing entailment, unless subject to the same law of descents as fees.

These entailments are abolished in the states, the words which would before have given an estate tail convey a fee simple. This has been decided in West's book.

This stat provides that the estate shall descend to the children & their descendants if any survive.

Real Property

Descents.

Were there no other clause, the grand children would take what their uncles would, share & share alike. But the fourth paragraph decides that the grandchildren take what their parents would, if the latter uncles live. But all the children are dead. So the grandchildren take per stirpes or per capita. The stat which applies to collaterals as well as uncles, provides that if any father or mother is dead leaving children, they shall be representatives. It does not say so in the case of uncles. But it means the same thing, where all the parents are dead is a matter of doubt. I think not. It seems reasonable for them to have been named with the rest of the stat. And it is not more hard to accept where some of the old stock are left.

§ 9. The clause in this stat applies to collaterals as well as uncles. And there is an express provision that if the brothers and sisters are all dead their representatives take per capita.

The representation in both lineal & collateral line goes on as in lineation.

But the estate descended on the part of the father. Here are no heirs. So over the father of the living child the

Descent

opinion of the gentleman who drew the note that the estate coming from the father means coming down the father's side. And this accords with my opinion, that there has been a misapprehension.

What have we? I get an estate by descent the father living. Descent in that state is extended far beyond its technical meaning, or there is immense difficulty in the construction of the stat. Descentive means then derived as an ancestral estate on the father's side whether by descent, gift or devise from him or any of his blood.

If there is no father living it goes to the mother and sisters of the blood of the father from whom it came, and to their representatives per stirpes, if any of them are dead. But if they are all dead, then their children take per capita. And the descent is ad infinitum.

But there are no brothers and sisters or issue, or father, when the estate is ancestral. It goes to the grandfather, & then to collateral relatives on the father's side. If they are in equal degree they take equally otherwise per stirpes.

Stoddard says the representation goes only to the third degree. But by the stat. the judge may pass it as far as he likes.

If no relatives on the side of the father, then the grandfather on the mother's side

Real Property.

Descents.

takes. And then the collateral relatives &c. If it came from the mother's side her line is preferred.

In case of a descended estate no preference is given to the whole over the half blood, if the half blood is of the blood of the person from whom it came.

As to purchased estates. This I suppose not to include devises. If it does the rules laid down above are incorrect. The real proposition is that if the estate is purchased & not derived from any ancestor, then it shall go to the purchaser & heirs.

There are no issue but there are brothers & sisters of the whole blood, they and their descendants will take equally. But there are brothers and sisters of the half blood, but none of the whole nor their representatives. Then the half blood take & their representatives.

After these the father takes it. And if no father or mother. Then the father's father & then his second father, & then to collaterals on the father's side. And if there are no such relatives, then it goes up in the maternal line.

That as in P. Carolina.

Real property shall descend to the issue of the person who dies seise, whether actually or legally. And when there is issue of the issue

Descents.

they take per stirpes. They take *ex intestat.*

But there is no issue and the estate came in descent, devise, deed of gift, or settlement; where the intestate would have been heir had he lived of the ancestor, the estate goes to the next collateral relation of the intestate of the blood of the ancestor from whom the estate came.

As to any person it goes to the next collateral kinman either of the whole or half blood.

51. Under this stat there may be a question whether "of the blood" is used in its literal or modern sense. This must depend on the determination of the Ct. there is no absurdity, let the meaning be which it may. The estate will be all disposed of in either case.

If the estate was intestate & the husband dies his wife is tenant for life, for the stat makes them tenants in common.

Stat. S. Carolina.

There is no distinction of purchase & ancestral estates. One third of the estate goes to the wife, where there are issue or their representatives and the remainder goes to the issue. If there is no issue a moiety of the estate goes to the father, & if there is no father to the mother & the other half goes to the wife.

Real Property.

Exemptions.

There is no widow, the whole goes to the father or mother. But there is no father or mother.

The widow takes a half & the brothers and sisters of the whole blood take the rest.

But if the whole blood issue is dead, then issue take with the half blood brothers & sisters.

And the brothers & sisters of the half blood ^{per stirpes} take all if the brothers and sisters of the whole blood are dead. Then the estate goes to the lineal ancestors, if there are no children of the brothers & sisters of the whole or half blood.

But the lineal ancestors may be dead, then the heirs go to the widow, and are there is the next of kin. But in computing the next of kin, you compute by the civil law, as an exception in the statute.

Devises by the Honorable T. Green.

Dec 11th 1794

The power of alienation was given to the
Saxons before the Norman conquest. And it is probable
the King and Roman Law governed in those cases.

The feudal restraints after the conquest were
generally relaxed as to devises as to other
alienations. But some places retain the old customs
as to devises.

Personal property was always devisable. And
this might be by parol, And so anciently real property
was devisable by parol. But the Statute Henry 8th
52. which first allowed devises of real property after the
conquest, required such devises to be in writing. This is
applicable to us, and the words in all persons except
joint tenants &c. But the Statute Henry 8th prevents
devises covert, infants persons of non sane memory &
certain from making wills. The last would have been
sufficient to prevent the Statute. But it was
certainly a good law. Devises at CoL & Apprehend
devises covert might have been in some cases anciently
permitted to be made by parol. The Statute 29 Ed 2d was made after the
conquest and settlement of some parts of our coun-
try. This as an Act is not binding on us.
It has been adopted in the terms of it, as
it respects the requisites of wills, in every State & the
use, and it was adopted after it had received a construc-
tion

Real Property

Devise

General rule of construction

Now, in England we are to give it the same construction.

The term Devise strictly applies only to real property. But it also applies to personal property. The restraints upon alienations of real property by devises continue long after those on alienations in any other way.

In those states where married women are not excluded from citizenship, the question whether they may devise their real property depends upon the question, whether they might devise personal property at all. I think they might.

The construction of the words in a deed and a devise is very different. A devise of lands to a man forever or in fee simple conveys a fee simple. But in a deed does convey only a life estate. The intention in the will must govern. But where technical words are required in deeds if they are not used the intention is nothing. The reason of the difference is that the rules respecting devises were later adopted, when the minds of men had become more liberal.

Out of the intention of the testator is apparently to create an estate not known at law it avails nothing. In all other cases it must govern.

Suppose a man attempts to entail a watch no words will support such intention.

Suppose a man devises to his heir male, that is an estate, that the law knows nothing of, a

General rule of construction Real Property

Devises

it cannot be created. A fee to the heirs male, unless of the body of some person, is not known at law.

The stat of wills confers no new power on a testator to create a new estate, unknown at law.

They are merely to convey estates before known, & this without regard to technicalities.

But I think executory devises are a new species of estates allowed by the stat of wills, for at-
 tending to a certain kind of fee, no estate in fee could be created to commence in futuro, unless there was an intervening particular estate to support it.

The questions that have arisen, whether an estate for life or in fee simple was created by a devise, are questions as to the intent of the testator. On this ground it has been held that all my estate conveyed a fee. But when a thing is given per se as blackacre bounded thus & thus, by such a devise it is held in law that a life estate only passes. But we consider it a fee simple & Lord Mansfield only considered the precedents applied, but not the principles.

Verbal words in a devise when used as to personal and real property have a different construction.

The words all my real property convey on of the real property he had at the time. But when the same words are used as to personal property, they convey all that the testator had at the time of his death, & the words have no reference to personal property.

Real Property.

Devise.

General rule as to republication.

property had at the time.

But real property acquired after the will made, will pass by a republication of such will property, attested to pass real property. But the will by republication ~~passes~~ embraces no more than the will originally would, if the same words were used at the time of republication. The republication merely gives the will a new date.

The will is ambulatory until the testator's death. Nothing passes and no interest is created until that time. Here arises an important question: whether the attestation of a legatee as a witness is good. *See infra* 222

, *Mo* 177

Formerly a revocation might be by parol. The act of 1847 renders the revocation bad unless in writing. This is adopted in most of the states but not in all.

No particular form of exception is necessary in a devise. Can a possessor of an estate, which may never vest, be devised by the person who owns the possession? When the contingency happens it is certain devolution. But before that it was held formerly that the estate could not be devised. But it is now devisable according to the latest decisions. The objection was that the person was not seized, and without seizure a man could not devise. But he is seized so much as the nature of the thing demands.

general rule of construction

General

A man of the State never to suppose as
various, devised and in some acts. This depends on the
words of their statutes.

No property in any is devisable except to
a fee simple, as the owner must be seized either legally
or actually. And there is no exception but in the case
of fraud. As where the eldest son by fraud seizes the
father just before his death, where he had devised ^{Boyl 94.}
away his real property. The fraud blows out the devise ^{Bro 629 55.}
of the son. ^{Bo 121 41.}

52. An estate in joint tenancy cannot by the
Ct. be devised. If the stat. makes all property de-
visable, joint tenancies may be devised. The word all
is introduced to make estates devisable which were
not before legally devisable. Our state renders all es-
tates devisable, and under these states estates per autem
may be devised.

In the year books I find a case where
a man has a piece of real property, & real property
was devisable by custom, & the Ct. held the custom to
be that all real property was devisable.

The 29th Ch. 2^d has been adopted with very
variations in these states. Some of the decisions
under the stat. Hen. 8th before that of Ch. 29th are still
held to be law and others not.

Under the stat. of Hen. 8th it was held the
will must pass be executed at the same time.
But

Real Property

Devises.

Decisions on the Stat. of Hen. 8.

p. 12 + 13

1 Mar 545.

1 Hen 8.

553.

But this has been over ruled by later decisions.

Suppose a man has three or four wills respecting different property, and they are all consistent, they are all good. But this was once disputed.

Suppose the latter will inconsistent with the former will, in one case the 6th Hen 8th wills good. He had by his first will given all his estate to a nephew whom he was very fond of. He then married a wife & gave her Blackacre for life provided she paid an annual legacy to the nephew. This is said to be apposite to other cases which I shall mention hereafter.

p. 12 + 13.

1 Hen 8.

Section.

p. 144.

1 Hen 8.

1 Hen 8.

Another point settled under the Stat of Hen. 8 which I take still to be law is that if a will refers to another instrument, it is good and that the instrument referred to is to be taken as part of the will so much as the will has been relied on in the will.

A second will different from the former is a revocation of the first. But a codicil is not a revocation. It may alter it, or may republish the will. If annexed it is a codicil without express reference to the will.

Where a man mentions in a letter the manner in which he means to dispose of his property, this under the Stat of Hen 8 was a will.

If a man had during his illness directed his attorney how to draw his will, the attorney drew it, and brought it to him after he had lost his

Real Property

Construction of the saving clause in the Stat 29 Geo. 2. c. 3. Devises his reason, and would not assent to it. This was held a good will under that stat. This however is of no use, unless as it respects personal property.

The stat of Geo prescribes certain requisites which must be complied with or no intention of the testator will convey his property.

The requisites are all lands devisable by the stat Geo 2 & all devisable by custom should be devised in writing. 1st The devise must be signed by the testator or some person in his presence & by his express direction. 2^d It must be attested & subscribed by witnesses in the presence of the donor.

3^d There must be three or more credible witnesses.

No particular form or technical words are necessary, if the intention is expressed that is sufficient.

The locality of the place where the will is made must govern. It will must be executed according to that law. 2 R. W. 291

It is not uncommon for a man in his will to give another power to transfer his property. 1 R. W. 291
If one the transferee takes this power by the will 2 Atk 258 }
the will must be legally executed. 255.
The trustee must then convey it by deed or will. And if the trustee conveys it by will, that must be executed as to convey real property. a vet 179

1st The devise must be in writing.

Real Property.

Devisee.

2 Blk 350
Cow 318.

2^d It may be signed by the devisee or some person in his presence, and by his direction. There arose a question what is a signing. And it was said that the testator wrote down in his own handwriting at the beginning of the will was a signing. This is already settled. But I doubt whether this is correct on principle. But why, not good if the handwriting is another. This the law does not allow at least there has been no decision supporting it.

2 Blk 419.

2 Str 44.

2 Blk 373

There was a will sealed by the devisee and the question was raised whether sealing was signing. Three of the judges held that it was, but in that case the will was in the handwriting of the testator, with his name at the top.

Wright on Devises

Doug. 229

But it has been since held that sealing is not signing.

But the man wrote the will with his name at the top, and desired his will to be brought to him to sign and before it came he could not sign. The Ct held this will not well executed. For if there is a clear intention to sign in the usual way, & this intention is not carried into execution there is no signing. I suppose the Ct was opposed to the former decisions and were determined not to extend them farther.

The stat does not require sealing, and takes it to be no question, but that it is good without

But

Real Property

Devises

But it is usual to seal wills.

3. It must be attested and subscribed in the presence of the deviser. What is to be attested? Clearly the witness attests that the deviser signed the will, and the attestation is prima facie evidence of that fact. It is further said that the witness attests to his sanity. But this if so is overlooked. For the witness is allowed to come into Ct to swear to his insanity. But he would not be admitted to swear that the testator did not do the corporal act of signing. He ~~sides~~ this attestation. Besides this attestation at least

54. is mere prima facie evidence of the testator's sanity. In the presumption without this attestation is the same, so that it is useless as an attestation of this fact.

What must the witness swear to do more signing. It must be signed in the presence of the deviser.

The testator signs it in the presence of one witness & he attests it. Then another comes in must the testator sign it over again? It is usual to run it over with his pen. But it is now held, that if the testator says to the second witness "This is my will & I signed it," this is a sufficient signing in the presence of the second witness. But if the deviser said this is my will but did not sign it this is not enough.

2 Ver 255.
3 P. W. 209.
2 M. 182.
2 P. W. 505.

what

Real Property

Devises.

Status of Devises

Part 51.

Talk 395.

1 Br Pl 99

What is a signing in the presence of the devisor. It is now settled that if the witness sign the will, when it was probable for the testator to see him this is in his presence, whether he actually saw him or not. If the man were blind, if he could have seen had he eyes this is sufficient.

But there is a case where it was contended if he could have seen the witness sign but did not the will was not good. But it was 1 Br Pl 99 405 contented on the ground of fraud. The man was said to have been doubtful whether he would have the will attested or not, and the witness signed it before he thought of it. But this fact was not proved at the trial and the will was sustained.

The witnesses do subscribe in the corporeal presence of the testator, but he had not the use of his mental faculties, this was held not a signing within the stat.

How will you prove the signing of the testator. Only one saw him sign, he may swear to the signing. The law does not require all the witnesses to swear they saw the testator sign it.

If the other two witnesses are out of the jurisdiction of the Ct or Deas, one may certainly prove it. He may swear to the signing of the other two & that they all saw the testator sign, & the witnesses can all be had. There is only

Real Property.

The 5th Case.

Devises.

only one is adduced you have not the best evidence that the nature of the case admits.

But the witness swears that he saw the testator sign the will but he did not see the other witnesses attest. Then prove the handwriting of the other two witnesses. And this does not prove that these two witnesses signed in presence of the testator. Then this fact must be presumed, and it will be so presumed, and the will proved. And if all the witnesses are dead you must prove all their hand-writing, and this proves the will. But here the testator's hand writing must be proved also. Dr. 1096.
1 Bl. R. 305.

But suppose one witness swears that he signed, & that the others attested the will & signed in the presence of the testator & of him, & the other swears that this is all a forgery, that he never signed the will nor saw any one else sign it. This may be proof if the jury believe one witness & disbelieve the other.

When a witness admits his signature he will not be permitted to swear that he did not see the testator sign, for this is what he attests by signing.

Real Property

State of Texas

Devises.

Lecture

July 17 1813.

as to the number of witnesses, three or more are necessary. What are three or more witnesses? I saw a will in which there were but two witnesses, but afterwards added a codicil where to which there were two more witnesses. The will was held not to be good because the witnesses of the will knew nothing of the codicil & the witnesses of the codicil nothing of the will.

35. There was a will without any witnesses, the testator being ignorant that they were necessary, but there was afterwards a codicil recognizing the will attested by three witnesses, the will however was held to be good because the will was not presented when the codicil was made recognizing the will & this case was where the codicil was upon the same paper as the will duly attested, in which case the will being present was supposed to be known to the witnesses & therefore good.

A will was upon several sheets of paper, to each of which the testator subscribed his name, and at the foot of the last sheet the witnesses subscribed their names, it being one will and all the sheets being together it was held to be necessary that the witnesses should sign every sheet the whole will being present.

Real Property

Twists

Nature of matter.

Another was a writing referring to a written instrument, and was made for the purpose of giving efficacy to that will, and wrapped up with it, the first will being present at the making of the second it was good.

Wherever there is a paper or codicil or other paper annexed to a will, to which codicil is made sh. 154 duly attested, and the will present, the will is valid.

1st Dec. 4/78 2nd must be attested in three credible witnesses. The question which has excited considerable interest, is whether any person could be a proper witness to a will who had a legacy.

Another is what when you come to prove a will, can those who had legacies, can be receiving their rights become good witnesses. Hence to admit a person to prove a will, who has a legacy to him, it would be to reveal money into his own pocket. ^{He is not a party to the will} Doubtless are considered as credible only with regard to the time of attestation & if not credible then cannot become so by any subsequent fact. This is said on one side.

On the other that he has no interest, & even if he had he can be purged of it, so as to become a credible witness. So Manifold answers given that even if a man were interested at the

trans. properly

Not yet finished

4. *Leucis*

of attestation he can be judged from it. But Lord Ellen says that he is credible or not at the time of the attestation, & if he is not then he can not become so afterwards!

Judge seems to think that he has no interest in the issue of the attestation, for it is contingent whether he will ever take under the will or not. But in ordinary cases the interest to exclude a man must be certain and not contingent, and the legatee at the time of attestation has certainly only a contingent interest. Prohibit the fact, the witness did not know of the legacy.

If motives are good as to the corporate
and the legislator, they are good ⁱⁿ ~~the~~ ^{when} ~~the~~ momentary

~~It is contended~~ say the word credible
~~is meant to point out some character,~~ was
it meant to except those who were interested.

I conceive that the word credible was not meant to describe particularly any particular persons, but a more thrown in, to mean that a person is a good witness who is of good reputation.

Real Property.

Statute of Wills.

Reverses.

If it had been the intention of the framers of the statute by the words credible to exclude persons who might be interested, they certainly would have expressed it more clearly. Since such persons are admitted as witnesses in every other case. It strikes me that they meant only that they should be ~~competent~~. Can a person purge himself, if I am wrong in my first opinion that he was a good witness at the time of the attestation, I think that he can now become so by an subsequent act, it was inadvisable in his ~~interest~~ of time will not make it other wise. But if he was a good instrumentary witness at the time of making the will, but afterwards by the death of the testator became interested that he can release his interest and become a good witness. If one of the witnesses had a legacy and the two others had not, they he has become disqualified and cannot swear in court, if the idea that he was competent at the time of attestation is correct, then may swear to his hand writing as a competent witness as they would if he had been dead.

The decision in *Strange* must upon the ground that they were not good instrumentary witnesses. The decision caused considerable alarm at the occasion. The Statute of 25 March 1800 which enacted that

No 1253.

25c 517.

June 2/14.

Strange 1253.

1802 277

Break Property

Devine

all because to witnesses shall be in. This has been a
doubt in some of the States. and from this start it
has been argued that the legislature were of opinion that
they were not a more credible witnesses. But no such argu-
ment can be drawn from the stat.

The opinions on this question are three Chief
Justice and the three justice judges with him, Lord
Campden & one of the justice judges, ~~Lord~~ ~~Justice~~
justs are in favor of the opinion that the course
is not a complete witness. Lord Mansfield & two
justice judges with him & the three justice judges with
56. Lord Camden contray.

Pow. 115. 19.
1 Les. 503.
(Wid vs. Chetwood)
1 Burr 414. &c)
2 Les 374.
1 Burr 418
Pun.
Hume & Cases
1 Day 41. note
Garthw. 54.

This question has arisen here & in the
supreme Ct. five judges preside, three held them credible
a two contrary. Then it was argued up again and of
six judges three were in favor and some opposed to
the opinion. The chief judge gave a turning vote
& admitted them. But the Ct. of Errors retained their
decision and decided with Lord Camden.

There has been one decision in our Ct
of errors which is said to have opposed to that
above mentioned. That was the case of a devise to the
town of Exeter. As to the inhabitants were ad-
mitted as witnesses or the devise. But that was on
the grounds of our local laws which Towns corpora-
tions where the corporation is an officer. But that is not
settled by the stat. as it is not become that

Oct 25. 111 cases are not necessary to grant
to not seeking advantage are void. That
Chancery they are a small satisfaction.
and then before such are done again.
the land one could be taken from
them. provided that the owner must be paid as

Real Property

Devises.

Parish of St. John.

any other publication than a compliance with the requirements of the stat is required in principle. If any publication is made, the testator's intent is sufficient. Under the stat then a publication was required, the writing of the will, any other act was not considered sufficient.

2 Nov 26.
 1840. 20.
 1840. 20.
 1840. 20.

Whether the entire will is present or not at the time of attestation is a question of fact & is left to the jury.

I have observed the manner in which the testator signatur is to be made, and how that of any of the witnesses is to be proved. I have also observed if the testator's signature of the case is sufficient.

Lecture

July 19th 1870.

Devocation of a Will.

It is said that if there be a will coming in personal & real property, that the will on account of some deficiency cannot take effect as to the real, yet it may as to the personal. But this is manifestly opposing the intention of the testator. Thus where a man devises his personal property to his eldest son & his real to the youngest the eldest will have both the real & personal

Reverend

Devises.

since the real not passing under the will, will descend to him, & he will take the personal under the will. But I conceive that such deficiency in the will should be considered a revocation as to the personal, for it is evidently against the intention of the testator to construe it a revocation of one & not the other. Revocations, are either express or implied.

With respect to implied revocations our law & the Eng remain the same as they were by the O. L. but as to express revocations the states in Eng have made great alterations, and in some states the statute are adopted, but in others the O. L. revocations remain.

This state requires certain solemnities to be used in a revocation, whereas the O. L. does not require any. And a revocation has no effect unless it has the proper requisite. But before the state a revocation might be made by parol. In some of the states it is only required that the revocation should be in writing. In some they have no law about it. Before the state all cases must be decided according as it appeared the testator acted animus revocandi. And so under the state a revocation without the animus revocandi now is not good in many cases, as where a man having made a record will declare the first but by mistake burnt the second instead of the first. The first was not lost, & so the

Roll 675 ab
Br J. 115. 417.
Liden for 70

Real Property

Wills

Revocation implied

B. The 6 & 7 more express declarations will not be sufficient to revoke a will. But a clear intention to revoke would be sufficient.

This revocation may arise from any collateral act of the testator, which implies an intention to revoke.

It may also be revoked by some act giving ground to presume that was his intention to revoke.

2 Will's 512.

1 show 589.

3 Wils. 237.

3 Will's 192

Comp. 87

7 Wils. 244.

If there is a revocation by mere operation of law

This implied revocation by some collateral act of the testator is inferred from a second will inconsistent with the former. But if it is inconsistent in any essential point, it is said to be a revocation of the first. This I think is straining the principle, I should suppose that it ought to be a revocation in all parts. It is however an established rule, and it is highly in the *pot stare decisis*.

Wils 148
186

A codicil will not revoke a will any farther, than there are words expressive of a revocation.

There was a case in which it was found that a man had made two wills the last inconsistent with the former, but some one had destroyed the latter. The Ct. of the supposed that there was a difference, not a trust.

Real Property

Deutsche

difference could not be known that it should not be considered a monocation.

There is one case in which a second will suffering from a former will not render it void, where there is a false presumption of a fact in the making of the second.

Thus in a case of a man making a will upon the supposition that one of his children was dead, and read in it whereas my son is dead &c, it was decided that the second will was not a revocation of the first in which the son who was not in fact dead, had a legacy.

57

John made a will in which among other things he gave a legacy to a certain charitable institution, & afterwards said to a friend that his will could not stand as the state necessitated his giving to a charitable institution, but it happened that this was one of those institutions excepted from the ~~institution~~ state, now as in his second will he disposed of it otherwise, from ^{law} ~~his~~ ^{the} false supposition; the second was ~~not~~ a revocation of the first. The state & mortmain were to prevent ^{the} ~~the~~ from giving their property to religious houses in Eng; but in this country they were never necessary, and are ~~therefore~~ no longer

$\text{or } N$

But it is necessary
to ensure as far
as possible knowledge of
the behavior of the
 a_1, \dots, a_n

$N = -\frac{1}{2} \log n$

7- $\log n$

for large n .

Real Property

Devises.

Revolutions, &c.

Suppose a will, duly executed, makes a devise to the first, and afterwards such a devise. Such will shall take effect. The second will revokes the first & the third the second. In the ground of intention the first will is revived. For the first will

4. Nov 25/12.

was, when it was made, that the second was a revocation, with a saving, so as to revive the second, it is apparently his intention to revive the first, tho' it might be otherwise.

Suppose the first will to be utterly cancelled or destroyed; it depends much upon who did it, if the testator himself, so that there can be no doubt as to the effect, and if another person destroys it, a question may arise whether the first is revived or not, by the cancelling of the second.

Suppose the second will expressly revokes the first but the second is afterwards destroyed, is the first ^{revived} ~~revived~~? if the ^{second} ~~second~~ had impliedly revoked the first, the latter if would have been revived, but it is said if the second expressly revokes the first, that tho' it is afterwards destroyed the first will not be revived. I do not see the reason of the distinction. The first will was cancelled, and a second made, afterwards the second was found cancelled, with a duplicate of the first, here I should much hesitate whether the first was revived. It was here in a discussion in this case

Case 49.
59.

Case 53

Real Property

Revocation ^{by} ~~by~~

Devisee

^{The operation of a} ~~of a~~ ^{circumstances}

The circumstances may be so altered that his will may be altered. This is a wide field for agreement. Thus if a bachelor having made his will afterwards marries and has children, this in certain circumstances will be a revocation, for it will be supposed to have been his intention to have revoked it, but neglected to do so. It is said that marriage alone in want children is not sufficient in that case to revoke but that it is a mere decum of the elementary rules unsupported by any cases extending to it.

It is not the wish of a child that creates the revocation, but it is impossible to suppose that a man would be willing to die and leave his children destitute, and give all his property away. But if he has made proper provision for his wife & children it will not be a revocation. It must be left to the trier to determine whether, his conduct in the disposition of his property

Case 182
Bradley
3d
Ct 182

in his case has been that of a reasonable man. It appears to me that if a man marries & has a wife & a daughter & a son, which became his wife & daughter & son, that a devise of all his property made before marriage, would be revoked notwithstanding the dicta of elementary rules. It is worth considering for.

Real Property

reviser.

Revocation implied.

The Acts are upon the supposition of an intention to revoke. But in a case where a man had made a will & then married but had no children, but eight months after his death his wife had a child, this Lord Kenyon held ~~that~~ no revocation of the will.

A man makes a will and is subsequently insane, and his estate undergoes many alterations during his insanity, which would have undoubtedly altered his intention, and the authorities concur in making such a will good notwithstanding.

2 B & C

2 B & C

Per 105

2 B & C 105

But it is not so in other cases.

If a feme sole makes a devise and afterwards marries, it is construed a revocation of her will, if the survivor her husband the will revives contra.

2 B & C 25-13. There was an instance in which a man devised all his real estate to his sons and his personal to his daughters and afterward became insane, and the payment of his debts and a very great expensess incurred in maintaining him destroyed most of his personal property, now this was no. held a revocation of his will. But these circumstances would undoubtedly have altered his intention, as he would not have left his daughters their destitute.

Real Property.

Revocation of wills.

Devisees

As other species of revocation, arise, ^{second} ^{July 20th} ^{secret}
 from an intention to revoke, as for instance when a
 will is deficient in its legal requisites, as that it is com-
 menced by itself, as if a revocation of a previous
 one which had the legal requisites? It will not answer
 to devise, but will it answer to revoke, if it
 does the estate will descend to the heir at law.

according to C^t principles. The evidence that he prefers ^{3 Atk 42}
 the second to the first devise is certain, but it ^{Roll 599.}
 is a matter of doubt whether he prefers the heir, ^{Roll 108}
 to the first devise, It has been settled that it ^{1 Vern 174.}
 will descend to the heir at law. The land will ^{known}
 not go to the second devisee because the will ^{9 Mar 190}
 was deficient in legal requisites and it will not

be given to the second devisee, because it was apparent
 to the intention of the testator to make it a new will
 law. This rule applies also to all cases

where the person, to whom lands are devised can-
 not take, there the heir at law must take.

There is such a thing as a revocation
 by alteration of the estate, and here the inten- ^{2 K Bk 519}
 tion is not regarded. The law upon this subject is ^{Roll 618}
 rigidly adhered to by C^t of law & Chancery ^{8 Co 90}
 If I make a will & give land to T M when ^{2 Atk 579}
 he sells it, but afterwards purchases it this ^{Rep. 1 Atk 594}
 will operate as a revocation. ^{2 Atk 585-82}
 (do)

Real Property

Roll 116
1 Shaw 92

A devise Blacre to B in fee simple he afterwards marries to make provision for his wife, he conveys that estate away in trust for his own life, remainder to his wife for life, the trust ^{was} answered, the trustee would have no farther estate in it & if not devised would go to the heir at law, but ^{alteration} that, was held to operate as a revocation, because there appeared no intention to revoke the estate in fee.

2 Lev 108
{ 3 P W
Northwood
(2)
Turner

A being seized of an estate in fee simple, &c. &c., which he cannot do, but in order to give validity to his devise, he suffered a recovery & took a fee simple, but the Ct held the alteration to be a revocation, tho it was in fact a void will ab initio.

3 At 803

The following case is very extraordinary. A man seized of an estate in fee simple devised it, but having considerable doubts about the nature of his estate, he consulted lawyers and to provide that if it was an estate tail the devise might be void he suffered a recovery, but it turned out that it was in fact a fee simple, but the Ct held this to be an alteration sufficient to revoke. This is very ridiculous.

2 To 968
1 Vern 329
1 Call 178
2 At 420.
205

as in ^{the} ^{case} of ^{the} Ct. never consider such alterations to be good revocations, but with effect to revocations pro tanto.

Revocation

Devise

Thus A devises a term of 20 years to B, afterwards mortgages it for 20 years to C, now A can redeem at any time during his life, so may the devisee after his death, it is a revocation. In re. Ch 584
 for term is for 20 years, & it will not consider this an alteration a revocation.

Of alterations not by the testator.

In Eng a man must not only have been raised to have a right of peerage, but must die seized or his wife seized. So that if a stranger disposes him, & he dies the devisee cannot take. Roll 618

Now where A devised part of his estate to B & some to others, now B being the eldest dispossessed his father & kept him out till death, the B interfered and laid him under a penalty to recover the land, as if it had descended to him. Roll 148

The question about a wills very re-
 order by him to his heirs if it is so then the
 it cannot be discovered what where the contents
 can be done. If the will is absolute des- 2 Nov 44
 trays the devisee cannot take it, but if it can
 be put together, it depends quod animus it was
 done, if the testator did it to revoke it will not
 take effect, but if by accident it is good.

This rule is laid down in some reports
 notwithstanding all that has been said.

& an alteration, must operate as something
 more than an abridgement of a will to revoke it.

Real Property

Devisee

otherwise it will take effect *pro tanto*. That is that there must be a total revocation. This is a principle inconsistent with some of the cases before mentioned. I think that this will be a *dispositio*, that an abridgement will operate only as a revocation *pro tanto*.

Re Ch 22

Express Revocations

Our Law in this country is similar to that in Eng on this subject.

Parol proof may always be admitted of the facts from which implied revocations will arise. No devise shall be revoked, unless, by a subsequent will, or it must be revoked by some other writing signed by him in the presence of three or more witnesses.

It may be revoked then by a second will. It operates as an implied revocation, if it can be shown with the former, that there be no clause contained in an express revocation. The law is decided that a revocation should be by void by word or by writing unless it be by a good devising will, or express well executed revocation, written & attested. But if a will is not a good disposing will it is not a revocation of itself. In a revoking will the testator must sign in the presence of the witnesses, & in a good disposing will the witnesses must sign in the presence of the testator.

Express

Test. Property

Revocation

General

With respect to the tearing burning or cancelling, or obliterating of a will.

If the second will is not a good disposing will, it will not operate as a revocation, & must have an express clause of revocation in order to be inconsistent with the former. It must have an express clause to make it an express revocation. But if inconsistent with the former, it will operate as an implied revocation at Col.

3 Nov 23. 1800 39
Carth 13
2 2 3
10 W 3 3

That branch of the case relating to the tearing burning obliterating &c made no alteration upon the C.C. for if the testator had done either at Col it voided the will.

Lecture
Feb. 21. 1813.

59. The smallest tearing of the will is void & is sufficient, and so it is, but it depends upon the *quo animo* it is done. If the will was torn burnt cancelled or obliterated with an intention to destroy, it is revoked. But if either of these acts are done by accident, or under a false impression, if the contents can be collected from it, it will be ^{second} valid if man commences destruction of a will which he supposed was executed, but a person told him that the will was not duly executed, & before he died he did not execute it, the first was held to have effect.

1800 39
2 1 3

There a case where a ^{man} ~~test~~ commences making destroying a will ~~but~~ stops, & the will must be considered void.

Real Property

But it is no matter how slight may be the destruction, if done with the intent to destroy, for it will operate as a revocation.

Where a man with an intent to destroy his will threw it on the fire, but it fell off and it was scorched, he had slightly torn it also there was no doubt but that he meant to destroy it he did not intend to see another will but often said he meant to make another, but never did. The will was held to be void.

I hesitate to make some alterations in his will, which the Ct. held not inconsistent with the rest of it, as altering 400 to 200, &c, & adding on 1 to daughter. Now the difficulty was that the three witnesses could not swear to the will as it then stood, every one will say that it is right to establish such a will as was done by the test.

Republishing.

A republication of the a will that has been destroyed, makes it will again. I don't have no doubt but that it would be the same if the revocation were express. I have seen no reason to the contrary.

I will shortly have some remarks to send or must a republication; and property cannot pass without them.

Thus if a man after having made his will acquires more real property, without a re-publication of the former will a new will be will be intestate as to this last acquired, tho' it is as good as to personal property. But such qualification must be duly executed.

to be in writing ^{and} upon the ground
that the republication was the same as a
new will.

But there are number of cases in which great varieties of opinions have arisen, whether the execution of a codicil will operate as a republication of a will the codicil being duly attested.

2 Am 498

It is a rule laid down that a codicil duly executed will operate as a republication of the will, if there was a clause expressing such intention.

2 St 180

Whether a codicil properly executed without such clause will republish a will? Lord Hardwicke said that such a codicil would operate as a republication, because the person making the will must have had the will in his mind, the will was contemporaneous with the codicil.

Whether it would make any difference whether the codicil related to real or personal property? The codicil being executed according to the stat. if it was decided to be a republication.

1st ed 494

1st ed 188

1st ed 544

Am 498

1st ed 234

1st ed 135

That the will
must be annexed
to the will.

1st ed 439

1st ed 821

Will a codicil executed according to the stat but not annexed to the will operate as a republication. What difference can it make as to principle, I believe that it makes no difference now. For there are some cases to the contrary. I take the rule now to be that if a codicil is made executed according to the stat, whether relating to real or personal property, or otherwise or no, will operate as a republication.

Real Property

Donors

The codicil ^{as a supplement} does not give the will any new qualifications. If a will has been republished but proves defective, it will not make it good, as the republication only republishes it as it was.

1st. 1802

Pr in 1830

2d. 1802

3rd. 1802

4th. 1802

5th. 1802

If a minor makes a will, but after coming to age republishes it it will be a good will.

With regard to the admissibility of parol evidence to explain there is not much difference between wills & contracts.

It may be laid down as a general rule that so far as declarations of the testator as to what he intended, at the time of making the will are admissible to enlarge diminish or alter it in any manner whatever.

It refers to declarations made by the testator at the time of making the will, but the observations of the testator should be made to dispose of his property so as when he should make his will, & his declarations substantiating it that he had disposed of it thus, such testimony will be admitted to explain the will.

5th. 1802

2d. 1802

3rd. 1802

4th. 1802

5th. 1802

6th. 1802

7th. 1802

8th. 1802

This rule applies equally well to wills as to contracts. Parol testimony will not be admitted to prove the terms of a contract, where the law requires those terms to be in writing.

Devises

but facts which there can be no example of involving may be admitted as proof.

I. I made a deed to J. K. but always kept possession of it for 20 years. This appears strange as J. K. never receives rents, he is sued for rent but never takes up the suit but pays the cost to I who appears content with it. There can be no doubt but this is a mortgage. Another circumstance was that I came to be saying that there was such a piece of land which he wished to let him which he did for 20 & paracre.

Whenever parol testimony is admitted it must stand well with the will, it must not in the least degree contradict it.

A will was made by a woman, giving to the four children of her sister but her sister had six, it happened that she had two by a very rich husband, & four by a very poor one, & it being proved that she had often said that she meant to provide for those four.

In another part of the will she made a disposition to the children of her sister and it could not be construed to mean the four children, without contradicting the will so that it was considered as to meaning the four but all of them.

If evidence from something collateral & exterior to the will parol testimony may be admitted to explain it.

Real Property

Exclusion of Parol Evidence

Devises

But if the ambiguity is on the face of the will the general rule is that parol testimony will not be admitted to explain it. The former is called a latent ambiguity, and the latter is called a patent ambiguity.

A man by his will gave \$1000 to a charity school in Kent, there is no ambiguity, in 1810. The will, but as he had always given a decided preference to one of them parol evidence was admitted to decide which was meant. for another case vide 1 Ch. 6 Mod 196.

We cannot guess out a person who is mentioned. A man made a devise to his children, to wit \$1000 to the son so much to the daughter so much &c & to the last child a great favorite was not mentioned, the question was whether parol testimony could be admitted to prove that he had a child. The Ct decided that it might, & decreed a legacy to the youngest child. It appearing from the face of the will that he meant to provide for all his children. This is no violation of the rule. 155 5 Ch 88. 2 T. R. 139

The rule is that where the ambiguity is latent the intention may be proved by parol testimony or extraneous circumstances, but the testimony must stand well with the will. 2 Bull 150

But it is otherwise where the ambiguity is patent, the will fails.

Real Property

Devises

Danger of Parol Testimony

2d 215.

If the ambiguity in the face of the will arises from one equivocal word, resort may be had to parol testimony to explain it, but not when the ambiguity arises from sentences.

2d 240.

1st 310

There are cases where ambiguity has arisen from false descriptions, in which parol testimony has been admitted to explain. If the devisee has been wrongly named, but the description points him out it is sufficient. As where a testator called a favorite devisee by a nick name, in his will, parol testimony was admitted to prove that he had always called her by that name, she had other names, but none of that name.

2d 215.

The devisor forgot the name of the devisee tho' his own child, but called her Charles but in order to be sure said now in the presence of the Duke of S, now he had a son in that service but his name was William. The son was adjudged to take under the will.

2d 240.

But a devise to Mr — will not admit of parol testimony to explain.

In a will written in Latin in which the words senior & junior were used, it being usual in Law language to use senior for either son or daughter, parol testimony was admitted to explain to what child the estate was so intended to be given.

Real Property.

Testimony of a Parol Evidence.

Purvis

The circumstances of a man's family will often make a word have a different signification from what it would otherwise have, & here parol testimony will be admitted to prove the state of the family, & thus explain the intention.

5 Boker
Hill's case.

As where there is a devise as to A & his children, if he had children, that word would be one of purchase, but if he had none it would create in him an estate tail, here parol testimony will be admitted to prove whether he had children or not, & thus to explain the intention of the testator.

D. I gave all his ~~real~~ estate to B on condition of his paying out certain legacies, say amounting to three thousand dollars, the question is did he mean to give him his real estate as he or for life, but B says his personal estate will not satisfy his debts, now I am to pay \$2000 if it is an estate for life, I may tomorrow it will then be a great loss to me. There can be no doubt but that the testator meant to give him a fee.

5 Boker 49
3 Burr 1888.
9

Parol testimony will be admitted to prove the circumstances of a man's ^{estate} ~~family~~ to prove the testator's intention. It does not follow that the strict and obvious meaning of the words should be adhered to, when facts make an essential difference.

Real Property

Devises.

I am not a *Trustee*.

inde 10th 21.

The words were attended with no *intention*, but to conform to their meaning would make the devise appear perfectly ridiculous, & facts might be collected to prove that, it was not so intended. The Ct held it not necessary to adhere to the literal technical import of the words.

inde 4
1st Ch. la 172.
for a similar case
which is one of
the highest
authorities

Thus if I gave to B, my house called the question is what estate I so takes, there is no doubt but that this would give him an estate for life, but he already had an estate tail, & I had the reversion in fee, so that it is evident that I meant to give B the fee, or else he could mean nothing, & would make Jd ridiculous. The Ct held that I meant to give a fee. But here it was necessary to introduce *various* testimony to prove the difference of estates they each possessed.

1st 2nd
V. D 509
2 L. R. 831.

inde 1st 54

A testator makes a will, in which he appoints his executor, his executor, ^{according to general principles, if the debts shall come, he is released} that is a release of the debt, but it is true so far only that when all his debts are paid it that no one can come upon him for the residue. But if the testator in this case gives an annuity, the debt of the executor will be considered as apportioned for the payment of those annuities.

Real Property

Devolution and Parol Evidence.

Devise

If a man devises his real estate for the payment of debts, it may be contended that he intended that he meant to cover his personal property & that this is not the legal construction, & a parol testimony cannot be admitted to prove that he have been his intention

There is no doubt that where bea-
ries are directed to be laid and are paid, that the
income remains to the executor if no legacy has
been given to him. New facts ^{cannot} be intro- 2 Bacth 42
duced to show that it was not the intention
of the testator that he should have the re-
siduum, because it would not stand well
with the will.

Parol proof is sometimes said to be an our Lecture
implication in law. July 23, 1813.

A great part of the business of a Court of
Chancery is to enforce contracts which are implied in eq-
uity, but which the Law knows nothing of.

The principles of construction in a Court of Ch
is different from that in a Court of Law however
unwilling Lawyers may be to allow it.

Thus a man estate is devised to J
to sell to pay his debts, he does sell it
to pay his debts, but there remains \$1000 in his
lands, this a Court of Law will not touch, but
it will consider him as a trustee & compel
him to pay the money he has to whom the

make
1802.
20. 182
taken off.
Date 79.

Real Property

Conveyance of Real Property
 Conveyance of Real Property
 estate would have descended. But parol testimony will be admitted to prove that it was the intention of the testator that none should have the residuum.

Where there is an equitable & legal construction parol testimony may be admitted to rebut the equitable construction.

Such a trust in the executor is called a residuary trust.

The rule of law is that where a man dies having made an executor to pay his debts legacies &c if there is no residuary legatee to take the residuum, the executor shall have it. But the rule of equity is that if there is a legacy to the executor then he shall not have the residuum, because there the testator has recognized him, & if he in that case had intended that he should have the residuum he would have appointed him residuary legatee. Now this equity may be rebutted, by admitting parol proof that the testator meant that he should have the residuum notwithstanding the legacy.

Again it is a rule in equity that when ever a man mortgages a estate & dies that the heir of the mortgagor may redeem, but even this is rebuttable. no parol testimony will be admitted for this purpose, to prove the

Real Property.

Admission of Parol Evidence.

Dunn.

He did not mean that his heir should redeem

It is a rule in Equity that where the debt or are paid out of the personal fund that if there is any residue that the heir of the mortgagor may call upon the executor for that money & upon the principle that the personal fund having been increased by that mortgage, that the heir may come upon it to redeem the mortgage. But parol testimony will be admitted to prove that it was not the intention of the testator that the heir should have the aid of the personal fund to redeem the mortgage.

11 L. 22,
525
2 Vern 255
577
Call 349.

The rule is then that where a man in claim in Equity, which would succeed in a Ct of Ch unless something to rebut it be admitted, parol testimony will be admitted to rebut such equitable claim.

2d Ch. 122.
C.D. 526.

There are some cases in the books in which parol testimony has been admitted when there was no occasion for it.

Parol proof may be admitted to prove that a devise in a will, made in performance of some promise, ^{or settlement} previously made. Parol testimony may be allowed to prove that the testator intended his

1. D. 29
2. Ver 223

Parol testimony will be admitted in cases of fraud.

1 Parol averments of the testator's ^{declarations} at the time of making the will, will not be admitted to oppose the will.

2 When there appears an ambiguity on the face of the will, not arising from an equivocal word but from the construction of different sentences, parol testimony will not be admitted to explain it.

3 If the ambiguity arises dehors the will as in cases of two degrees of the same name parol proof is admissible to point out the ^{one} intended.

4 Where there is an ambiguity respecting the devisee as if he is sufficiently described but called by a wrong name, parol testimony will be admitted to point

5 Where an equivocal ~~word~~ ^{word} ~~name~~ is used relating to a person parol averment will be admitted.

6 Where a word is used which may be either a word of purchase or ^{limitation} ~~restriction~~ parol testimony will be admitted to explain ~~and show it was meant~~ ^{and show it was meant}.

7 Where words are used not definitive of the quantity of estate which he meant to devise parol testimony may be admitted to prove what he intended.

8 If the words according to their technical meaning would render the testator

ridiculous, parol averment of the state of the property to give the will, the meaning, or, the testator will be admitted.

9. Parol evidence of the declarations of the testator will be admitted to rebut an equity.

10. Parol testimony will never be admitted to rebut the legal construction.

11. Parol testimony is never admissible unless it stands well with the will.

12. Parol testimony may be admitted to prove that the devise was intended as a satisfaction of some previous promise or agreement.

A man by his will may empower persons to dispose of his property, for a great variety of things, & the person thus employed is called the trustee and he may exercise the power by will or deed.

There is a distinction where there is a mere naked authority to dispose, and an authority clothed with an interest. In the first case, the estate descends to the heir untill disposed of by the executor. A naked authority is conferred by the words that the executor shall sell. bony 484
Ltbl 119.

As to the trustee being vested with an interest, it is certainly not. Of a devise is to executor to sell, they have authority if that the executor shall sell, they have only

shd authority. The authority thus given
to trustees is similar to that of an attorney,
and governed by the same rules. They do not
take as executor but as appointees. But
there appears to be some relaxation from the
rule that they are governed by the same rules
as attorneys in that if there are three trustees
appointed & one dies the other two may sell,
but it is not so with regard to attorneys.

But if there are thus only appointed & one
dies, the other cannot sell. The device being
that executory shall sell.

It is a principle in Ch that whoever
undertakes thus to sell property is compelled
to do so, tho if he refuse Ch could appoint
others to do so. But in the case where one of
the executors dies Ch cannot appoint another.

The person appoints to sell the re-
fuser as to do the act of Ch will appoint
he shall be sold.

Where an estate was given to executors
to manage & when they had an interest as
well as authority.

Where property was given to executors
for the purpose of for the good of the land
the land was not subject to be sold
at their pleasure.

Real Property

Devises.

of the flat of water

Recluse

Sept. 24th 1878.

On Eng^l & this country where the stat is adopted there are never ^{trust} estates, the stat having been awarded to the ingenuity of C or of Bk. Thus I give an estate to B to the use of C. Here the stat operates, But if given to B for the use of C or trust for D, here the legal title being in C the Ct of law could go no farther, & Bk of Ch carries the conveyance into execution. So that trust estates are as customary as any in Eng.

other page
2 L. Ka 873
1879
1879

But in those states where the test is not adopted it is not necessary to add the third person.

These estates then are valid under the jurisdiction of Ct. And they are a noble system of jurisprudence, of the greatest utility, and the inconveniences formerly experienced are avoided.

Cases in which a devise may become inoperative:

1st by revocation.

Moore & Co

2^d A will may become inoperative by uncertainty, it is not here that parol testimony can be admitted. Thus an estate was given to the right heirs of my name & posterity, parcel & share alike, the Ct could not determine what he meant should take.

Thus also "I give all my freehold estates to my wife for 5 years but if any of them should be out of freehold then to C." what he meant by becoming out of freehold.

So also a devise to "the poorest man in L." it is void for uncertainty.

So a will may become inoperative by uncertainty dehors the will. So a devise of ~~two~~ a thing to one person, when there are two of the same name. Parol testimony would be admitted however if it could be obtained.

Real Property

Devises.

3 If it is opposed to the police of Law
as if the legislator had attempted to create an
estate not known in the Law, the device as
to that part will be inoperative. As a de-
vice to A & his heirs forever, I with a condi-
tion that A shall not live.

Here a question has arisen whether that estate shall be wholly void. Those who say that it is urged that the intention of the testator must be followed, & he cannot take accorring to that intention. But the most liberal, and settled construction that the service shall take a fee simple, as that would be more conformable to the intention of the testator than that he should take nothing. But here the will is imperative as to the whole intention.

Thus also a devise to A & his heirs male general, here the question arises what estate he should take, since the devise taken altogether is contrary to law, it best compares in my opinion with the intention of the testator that he should take a fee simple. No same decisions have been that he takes only for life & others that he takes a fee tail.

Real Property.

Devises.

point. It is now become the law in Eng. that you may turn an estate tail to a fee simple, on account of subsequent escheptions giving power to alienate.

4th Another ground upon which a will becomes inoperative is where there is a devise to me to hold the property, would have descended by law. This is a very important point, since the one takes by devise, is exempt from many disabilities which the heir at law is subject to. But I do not know but that devised estates are clogged in a similar manner.

The principle that ought to regulate in the same in conveyances as wills. Thus an estate conveyed will always vest, tho' liable to be divested by defect. And ought never to be divested, but defect requires some act to recover it.

5th Another very important case in which a will becomes inoperative is where the testator has done in his life time, what he has devised to be done, the devise as to that thing becomes inoperative. As where I'd bequeath such devised 400^l to his eldest son to build him a house, but afterwards he has son marrying he gave him £1000 or more to build this house, it was decided that, the devise giving him the £400 was inoperative.

more 9th
is inoperative
after

Real Property

Devises.

6th Another case in which a devise becomes inoperative, is where states make appropriations of that property, as rendering it liable for the payment of debts, &c. it is no longer devised.

If a man devises his estate, what shall be taken, since he has devised it, here a reimbursement must be made by the whole as the ltr shall appoint, since it must inquire not the estates to take a part of each.

Those persons are incapable of devising ^{more incapable} before the start of Herolt all nations ~~can~~ devise. That stat says that any person can devise, but that did not give idiots & fools, but only those who were capable of ~~any~~ personal property at C. L. It may make some difference as to minors since they could devise personal property.

With respect to the discretion of making wills, that is always a question of fact & must be left to the ltr to determine. As if the testator were too old to retain his memory & faculties sufficient to make his will, or if insane or otherwise incapable.

If it be asked who can devise, the answer is, a man of sound disposing mind, & this is a question which the ltr must decide upon the evidence as is obtained.

Reviews

In one case a man was perfectly calm upon every other subject of conversation, but that of his property, upon which he was always rational, & had many years before made a will of his property, as he had now done. He at last felt the will good.

It will now also be imperative an account of the direct of the states, as in person not, under the influence of terror, & over-impulsed on his sick bed, and evidently makes it to get rid of such importunities and makes a will according to their desires, in ordinary cases of this kind, the will ^{is} ~~is~~ ^{approx} ~~the~~ ^{the} will; but if he afterwards recovers, the will will be held to good.

Lecture #
July 24, 1813

There is one other character about which a great question whether she can devise. The English law requires that no married woman can devise, & in some of the states the state is adopted, but where it is not, it is still a question whether the wife can devise. Now the real property of the wife remains in her & does not belong to the husband. The only interest he has in it, is that of dower. The question is whether she can devise her real property if she does not affect his rights, which she can never do. But she cannot defeat his right of dower, nor he hers of dower.

Real Property

Devises.

There is a clause in the stat. saying all other persons incapable so that it still remains to be determined who are incapable at O.L.

There is an argument that in those states in which the stat. has been adopted with the exception of the clause relating to married women, that they mean they should devise. But if they come under the denomination of those incapable it makes no difference & if they are capable, it then makes no difference.

The object of the stat. was ^{as the same clause} to give ^{personal} property as to devise, as personal, so that all persons who were really incapable and to devise personal, were also to devise real.

But this was not its intent it means nothing.

So that the whole question turns upon this point 'could a married woman devise personal property before the stat.' With respect to this subject, the objections that have arisen are as follow,

1st All the notions of devising were taken from the Romans & they had a law giving that power to married women, it is therefore probable that before the stat. women had this power. There are one or two cases, one good that the wife did devise before the stat. of Henry 8th.

Real Property.

Devises.

All the personal property of a woman belongs to her husband. We find in Bracton that married women cannot generally devise but there are cases in which married women did devise but it was by the consent of the husband, but in all those cases it was where she devised her husband's property. The question then arises whether if she has property of her own she could devise. In there are cases in which she could & did.

Her paraphernalia were always considered as her own as much as the horse of the husband belonged to him.

It was also customary for the husband to endow the wife with personal property which gave her absolute power over it, could she devise it without his consent, two of the greatest lawyers of the age asserted that she could devise all property which she held distinct from her husband. This point ~~is~~ ~~as far as~~ ~~it~~ appears to be established that the wife could devise her own personal property, if it does not

Again a married woman was allowed to make a will of part of his property, & if he died before her she

Real Property

Descent

had a part of his personal property, called a rationalibus part, a woman during coverture devised her rationalibus part, after her husband died before her. The Ct held the devise good.

Since the start the same question came before the Ct, a woman during coverture devised her real property, & the husband died before her it was held void as illegal in its inception. But 65 it was held otherwise with regard to personal property.

Since the start of wills which forbids married women to devise real property it has become usual for married women to hold property sole & separate distinct from her husband, & it is now beyond a doubt that she may devise it. But it is said that this is done in Ct, true but Ct cannot act in direct opposition to law. And if it were transferred to Cts of law it would be the same.

There is a case in which a ~~man~~^{woman} devised a great real & personal estate to her daughter to her sole & separate use, the Ct held that the personal passed but the real not, now it is reversed, then the Ct held the whole & not the Ct as

Real Property

Devises

The instrument.

A married woman, & her husband enter into articles of copartnership, in which it was agreed that he gave up all his right to her real estate. She conveyed her real property during her life, & the question was whether the grantee or heir at law should have it. The Ct held that the husband had given up all his usufructuary interest & therefore the grantee should take as there remained nothing to prevent her disposal of it.

Upon these principles a married woman who is executrix with an interest may devise that interest, because on the principle that the husband has no interest in the estate.

It is always said as an objection that the husband & wife are one person. This would go equally to prove that the husband could not devise. *J. Blackstone* says that she is not if ever merged in her husband, & could therefore do no act, but it is far otherwise as in many cases she can act distinct from her husband, as she may be an attorney, where he is not.

Both these reasons are sufficient.

Of a woman coming away her prop-
erty by force & recovery, it is certainly said
unless she defends it, as all the authorities
prove.

Another maxim is that a married woman has no will, this is absurd, if they have no will they can commit no offence, but married women have generally as much will as other women. These maxims must not be insisted upon, they only serve as

The great reason is this, not that the husband has ^{absolute} power over her, but that it would be best for her, that she will should not desire since he will may be made by the coercion of the husband's

Therefore that she would after due con-
sultation be ^{instructed} ~~instructed~~ that this power
be much since the same objection
which will hold against all conveyances.

Since death may be equally ^{the} effect of exercise.

But says Rev. if this doctrine is good
that a married woman can derive her property
what is the reason that she cannot convey
her real property if he ~~objects to it~~ ^{and} ~~as it is in~~
marital right is rejected.

oblong
ancient, for
imperial
republican dis-
ciples.

DENVER.

Real Property.

{ 1 Revere's History
of the City of Denver
307. 117. 181
1079.

March 60.

Index 173.

{ 5 Harry 6 years
March 31. 39.

{ Brooks Denver
27. 34.

{ Ber Ch 219.
346

140

1 Ber Ch 10.

2 Ber 75.

{ 1 Ber 503.
518.

3 Ber 709

in Ber 205.

10. 10. 10.

2 Ber 316.

1 Ber 245.

2 Ber 250.

{ 1 Ber 211.

{ 2 Ber 218.

Thomas R 230

Index R 92.

1 Ber 100.

The cannot make a conveyance of real property to
commence in futuro. This is an unyielding maxim.
The husband must then join to convey his own
share. But why, can't she convey her remainder, her
another maxim arises, no remainder can be created with-
out a particular estate created at the same time.

A case has been decided in Ber Ch 107. The
device of a married woman was good, but
an appeal to the superior Ct it was reversed.
It was then carried up to the Ct of Errors
& there the judgment of the superior Ct
was reversed, & that of the Ct of Probate
affirmed, that a married woman could devise
in the first decision of the Ct of Errors
there were 7 in favor & 5 against, but the
opinion's changed so rapidly that in a short
time, there was only one dissenting vote.
It is now fully settled here by law that
such a devise is good.

Real Property

Devises

Devises

Lecture

July 27, 1875.

Almost any person may be a devisee. There are some restrictions in different states on the subject.

It is not necessary that the devisee should have arrived at years of discretion, for a child a year old may take. And so of grants. The devisee is not compellable to take under the devise, but may receive it, & so a grant of real property as soon as devise words in the devise, but personal must go up to the executor to receive the demands of it. The heir at law has no title nor the executor. If a trespass is committed, the devisee may bring the action.

66 There is no disqualification for a devise, but she may lose the devise, by the husband's disavowing it, but not because he disavows it from his will, without good reason. But if an estate is devised to the wife to vest after his death, no act of his can defeat it, he has no interest in it. whether a husband.

It was once a question could a devise be to his wife. But it is now settled that he can. By the old maxim that they are one holds true, he could not receive at the inception & the devise was devising to himself. There is nothing in the nature of the thing that should prevent him from devising to her. It is common for him to convey to her, but he does it not directly, yet what

Real Property

Deceit.

is equivalent giving the deed to another person, for her use, & as the use gives the legal title, the giving the deed to the third person is a mere fiction. It is so may the wife give to the husband. This method of conveying is used to preserve the maxim entire. The presumption of law is that she is a feme sole, tho the fabrication is meant to give an estate to a married woman.

Then it is said cannot be done, but this is incorrect since the grantor, tho an alien loses his title, & tho the estate is liable to forfeiture upon office found, yet he may take, & the legal title pass from the grantor. And the grantor cannot eject him, & if he is interrupted in possession he may bring an action of ejectment, and if he does it will succeed.

Legitimate children can be denied, but they labour under certain difficulties arising from a certain maxim, which it is idle to obscure, i.e. that he is filius nullius, for so you may just as well conclude from the maxim that he was never born. But the respecting settlements upon bastards by a course of adjudication, has been altered.

They can take only where they have acquired a name by reputation, and not under the description of sons.

Real Property

Devise

Suppose a man gives an estate in a will to his eldest son legitimate or illegitimate. The eldest son if illegitimate could not take not having been designated by a name acquired by reputation. But if he had called him Thomas as it would be otherwise. But the maxim filius nullius prohibet heri coming under the description of son or sons.

Suppose a man had three illegitimate children, & devised to his three children. This was a good devise to them, at the time of making the will he had three illegitimate children, but at his death he had ^{three legitimate & three illegitimate} six children, & these words three children was not sufficient to give the three first the estate. Any words amounting to a good description of an illegitimate child will be sufficient - red quer. But in the above case a general devise to his children, he ~~by~~ would have excluded the illegitimate.

As to uncertainty who is to take. It is no objection, since, provided something must happen to render it certain. As a devise to 'one of his daughters who shall first get married'. There has been a great deal of case depending upon the validity of a devise to a person not in esse, I shall not say much about it, but direct you to the authorities.

1 AB 410

752
128

Real Property

Devise

It was said that a devise to a child when it should be born was good, as it resembled a contingent remainder, the particular estate not being necessary in a devise. But if the devise was to the child, ^{born}, that was held not good because said they it was the intention of the testator that it should vest ^{born} immediately, but the child is not therefore & therefore the devise is void. But there is not a single case, there cannot be one in which the intention of the was not that it should vest when the infant was born, & the Cts will now always put such a construction upon the will, i.e. that the testator meant the estate to vest when the infant shall be born. So that all the learning is of no use except to gratify curiosity.

A devise is good if the devisee is sufficiently described, without mentioning his name. As a devise to the sheriff, the parson of the parish &c.

Where a man devises to his relations what is to be done, the Cts of law have restrained that word to the meaning in the stat of distributions. The subject of description is not important to be much treated here, any word of description will

11 Geo 82,
11 Geo 759
761

Real Property.

Executory -

Is taken in its technical meaning, if possible but may operate as a word of purchase, where it is absolutely necessary to conclude that it was thus used.

Reveries

Thus a man having two daughters & a nephew, devised to them ^{daughters with estate} & then to his heir male, the question was whether he could take not being heir, while his daughters lived, the Ct determined the word heir to be used in this case as a word of purchase.

59. The rule there as adopted seems to be that the word heir is to be treated as a word of limitation, unless attended with circumstances, which will give it no meaning, unless taken as a word of purchase.

1 Lev 200

1 Vent 334

342

2 Do 311

Holt R 32.

Executory Devises.

To understand what it is that constitutes the difference between executory devises & contingent remainders, we must consider them together. Technical words are not essential in a devise, if the testator's intention be very, and is not contrary to law. But executory devises seem a departure from the rule since these estates are contrary to law, as being an estate to commence in future without a particular estate to support it.

But wherever a limitation in a devise can be taken as a contingent remainder it

Real Property

Devisee.

Executory

will be true then, & not as an executory devise.

So that whatever estate given in a devise, would be good in a deed, is not considered an executory devise. Therefore not every conveyance b. will that would be good by deed is ^{remainder} ~~remainder~~, and even conveyance in a will that would not be good in deed is an executory devise.

Lecture
July 28th.

The best ideas of executory devise are to be obtained from a comparison of them with remainders.

In a remainder the intention of the grantor must yield to technical rules. But in executory devise, the intention of the testator is the governing principle. A remainder must arise by express or implied grant in a particular estate. And in that case the whole estate passes to the grantor of the particular estate & remainderman the latter being vested with the fee. This is a vested remainder & cannot be defeated. But where the estate is to vest upon some contingent event, so that it may or may not ever vest, it is a contingent remainder. And this contingent remainder can never be limited upon any estate less than one for life. It is necessary, that there should be a freehold created, which an estate for years is not. But it is otherwise in a will, for there is no necessity for a freehold. Another maxim is that in a deed a fee simple cannot be limited upon a fee, but it may in a will, not being good in a deed but

Executory

Devises.

being so by a will it is an executory devise, & as such the limitation is good.

One thing gathered by what we have seen after a life estate in fee, is that we can create a remainder upon a lease for years, & a life estate is greater than estate for years, this is a scholastic reason for the rule, but it does not hold in will, for there such a remainder can be limited. The three cases of executory devises are: That a fee may be given for commencement in futuro & a fee can be thus limited after a fee, & a remainder after a life estate in a lease for years.

A remainder is an estate limited to take effect after the determination of a preceding estate. It is a present estate, to commence in possession in futuro. And it must be created by the same act as the particular estate. When an estate is greater than an estate for years, conveyance of reversion is necessary.

A remainder may be limited to take effect upon an uncertain event, as well as a certain one. If the particular estate is destroyed the remainder is destroyed. So that in a contingent remainder we cannot give a life estate & a remainder, which is the cause of the introduction of trustees to support contingent remainders.

An executory devise is an estate created by a will to be enjoyed at some future period. It must be such an estate as cannot take

Real Property

Devises

Ex entory

2 Bl 170

under the description of a remainder, or it will be considered as such. It does not require a particular estate to support.

In an executory devise a fee may be given to take place ~~off~~ of another fee upon some contingency. But in both those cases the contingency must be such as will happen in a reasonable time, or perpetuities would be created.

The length of time that was first determined, was during a life or lives in being. But it is now extended to a ~~it~~ it was in case of an estate given to the eldest son of B but B had no son, that makes no alter the estate remains in the grantor until it takes place, but perhaps B dies before the birth of such son, and say that he died the day that he was born, by the old rule the estate would have expired, but it does not in this case held good to the son. In another case afterwards, the estate was given to the eldest son of B when he arrived at 21 years, then as he might not be born till after his father's death, The Ct. held that such a limitation might be for a life in being & 21 years afterwards. Afterwards it was extended to lives in being, 21 years & the fraction of a year.

2 Bl 172

The third case is that a remainder may

be created after a life estate in a term for years by way of executory devise. ~~But such a limitation must be within the rule respecting time for it to take effect.~~ All those remainder men must be in life at the time of the death of the first devisee, & the contingency must be such as must happen during his life. 200178

The Statute of Con. puts executory devises & contingent remainder upon the same footing. declares that all kinds of estates given by will to any person in life, or to the ^{immediate} descendants of any person in life.

58 There is a great question whether, if an estate is given to a person & if he dies without issue remainder over. So any person but a lawyer it would be appear evident that it meant if he should die leaving no issue at the time of his death, but lawyers say that dying without issue means a failure of issue at any future time however far distant, so that such a limitation would be void. The point is as yet unsettled. I fear confuses all the authorities upon the subject. Once argued a case, in which if that principle had been observed in Con I should have gained my case, but common sense ruled & I lost it. ^{vide Philip Dorman's case}

Real Property.

Devises.

11 Nov 220. Houses in ... to be for life remain-
 der to C. This evidently a good remainder.
 To the eldest son of C. This is a good
 contingent remainder.
 To the said son.

Gr 2590 a good
 living case.
 5 to 226
 Gr 2598.

Of the word Heir.

The different cases upon this construction of
 that word are irreconcilable.

Entire
 July 29, 1810
 16. h. 7

The dispute is upon the rule in Shelley's
 case, viz. that if an estate is given to a person
 for life & in the same instrument, it is given
 to his heirs in any part thereof, that it gives a
 fee to the person upon the estate for life ^{or a fee} _{in no other}
 situation, and number of intermediate estates, inter-
 posing between the said limitation for life & the
 limitation to the heirs. So if an estate is given to
 J. D. for life remainder to his heirs, this gives J. D.
 a fee simple. It may also be an estate tail
 59. Thus created there is no dispute as to the validity
 of the above case that an estate fee simple is
 created, all agree that is correct.

But a great body of lawyers say that
 if there are other words demonstrating the in-
 tent to give the first devisee an estate for
 life only, it shall give only an estate for life
 while others contend that it is nevertheless an
 estate in fee. This is the great dispute.

One party says that no intention can
 be supported in opposition to the technical mean-
 ing of the word heirs, while the other contends
 that the intent must govern in spite of
 the word heirs. However those who insist that
 the upon the technical import of the word heirs
 will admit, that it may be used as a word
 of purchase.

Of the word heir or heir

vide

New 343.

vide
New 259.

New 343.

Heir is the de jure. The word heir is used to designate that class of persons, who happen to be heirs, the word is used to signify the quantity of the estate, & then technical meaning must prevail, if used to signify other persons they operate as words of purchase.

However in *Devins* the rule in *Healey* case has been sometimes broken in favor.

Those who contend that where other words interpreted manifesting an intent to give an estate for life only, admit that without such words the intention of the testator will be best ascertained by construing it as given in the first case yet where he has used words expressly giving it to his wife, & subsequent limitation over, there the intent must be followed & the first takes home an estate for life, & his heirs according to the limitation to them.

- 15 N. 10
x 1000 case

The leading case where the intention was followed, ~~was~~ it was a limitation to the wife for life, & to the next heir male of the body of it & the heirs males of such heir male. There it is not only given to the heir male of it but also to his next heir males. This case was decided by Lord Mansfield. Does the overplus words the heirs males of the next heir male. The word heir male will imply every heir male forever but, the Ct held that these words

were included ^{to} But it is said that if the words heirs
 least 225 designate the real heirs, ~~it~~ they must take
 by descent, but where used to designate
 particular persons, they take by purchase.
 Their or heirs must always take by descent.

2d 287.

1st 287.

2d 287.

3d 287.

4th 287.

5th 287.

6th 287.

7th 287.

8th 287.

9th 287.

10th 287.

11th 287.

12th 287.

If a term can be used in two persons, &
 as explanatory words are annexed to it, it is almost
 that those explanatory words are to be rejected
 & a devise to the first heirs male of his
 body & the his heirs male, that was held to be
 and estate tail, how is that reconcilable with
 Archer's case, the only difference being that in
 one it was his male & the other heirs male, but
 the fee is signifying the same thing exactly.

The words first next &c heirs superfluous they
 may be rejected in Archer's case. But it is said
 that in Archer & his words for life are used
 but that makes no difference. Perhaps those cases
 from redundancy & superfluity, & they are the same
 as the decisions are opposed one to another.

At the when an estate is devised to go for life
 & his heirs forever it is a fee simple, yet if such
 an estate has been covenanted to be settled upon
 for life, it would be otherwise, the Chancellor
 would meet an estate for life to go to, &
 remainder to his heirs.

Dr Joseph Jekyll in the case of *Carlton v. Rose* decided that the devise took an estate for life tho' the words were heirs were used to designate the testator's heirs, & not any particular persons. But Chancellor ⁱⁿ *Pappell v. Rose* being reversed in judgment so far as related to lands but the money to be expended in lands, he considered as a covenant to be carried into execution, & therefore as respecting that confirmed the judgment of Dr Joseph Jekyll.

In this case the Chancellor must have admitted the word heirs is he used as describing persons in the distribution of the purchased lands or how else he could have known who to give them to, if they were not description persons he had no right to give them so, and if they were, why did he not treat them as such, with regard to the lands devised.

The case of *Boulton v. Boulton* is not approved by the Ct, & several judges have observed that they would have determined it otherwise.

These judges expressed their opinion that where technical words alone are used they will operate as such, but where their technical meaning is altered by others explanatory of different intent, such intent shall be favored.

But the doctrine in the case of *Devlin v. Blake* is that when the word heirs is used as a name collectivism, no other words can give it

10 W 142.

605.125

2 P. W 349.

a different construction.

The ancient lawyers on the English differ upon this point, and the last decision is on common law. But it seems to me strange, when the same words in a covenant for a settlement, operate as words of purchase, & yet always give the same construction, tho' unattended with any other words, more fully explaining an intent to create an estate for life, with remainder to the heirs. Why should we suppose them used in different cases in these cases, & why if the same word was in both cases, why should a different construction be imposed upon them?

Of the construction of the word Heir when applied to a personal chattel.

Personal estate is not descendible. And if words are used in the disposal of personal property, which would create an estate if applied to real, the interest becomes absolute in the first taker.

But it is now established that a life estate can be created for in a personal chattel. Why then if a personal estate be given to J for life remainder to his heirs, could not J have any an estate for life, with the remainder to his heirs for tho' the whole intention of the testator cannot be carried into execution that is, that it should go to the heirs or after another in perpetuity, yet it would be to carry the intent of the

testator into execution as far as possible, which
 could be best done by giving the first taker
 an estate for life remainder absolute to his heirs

There are here, however, two points, so that an estate to
 the heirs of a person living, if he does not die
 before the testator, the devise lapses. But if the
 estate be given to the heirs of a now living, the
 words will operate as words of purchase, to
 the heirs apparent.

It is said to some that if the word estate
 is succeeded by words of locality it will create
 an estate for life only, so All my estate in
 Hb. But it is said is merely a description of
 the property of Hb. but I conceive that it
 would now be decided as a gift of a fee, the
 latter authorities being to this effect

All my effects both real & personal, pass
 a fee. "I am worth" likewise.

In all cases where the testator has used
 words which are so necessary, infer that he in-
 tended as passing a fee, they are to be so con-
 strued, tho' that he not there technical meaning.

The word heirs was used in hands, as necessary
 to bind them, but it is ~~not~~ useful in their
 country as the real as well as personal
 property is liable here.

On the words of
 the words of
 the words of

30. 11. 259

2. 4. 37

5. 11. 11

2. 11. 2

6. 4.

2. 11. 8

1. 11. 2

2. 11. 2

2. 11. 2

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2. 11. 2

2. 11. 2

Real Property
 Alienation by Deed.

I would premise that the word purchase is used in the law in every mode of acquiring property, but in descent there are modes of acquiring property which we shall not consider. It treats of them sufficiently at large.

The most usual method of acquiring estate is by alienation that is in the more limited sense of the word purchase. There are others as gift &c &c &c.

The word alienation comprehends every mode of creating title by which estates are voluntarily conveyed by one & accepted by the other. Every purchase is an alienation, but every alienation is not a purchase.

A title by occupancy is acquisition of possession but it is not an alienation.

If one disposes another & continues long enough to acquire title, the title is acquired by purchase but not by alienation. Mutual consent is there wanting.

Purchase is a genus of which alienation is a species.

1st With regard to the nature of deed

The legal evidences of the alienation of real property are called in the law various assurances. Of these a deed is one & also a devise.

2^d Deed &c &c
 Or Deed

The reason why they are so called is because they are the means by which a man's estate is assured to him.

The species or kinds of assurances are four

- 1st Deeds or matters in pais
- 2^d Records, Matters of Record

1801 N. York

1801 N. York

1801 N. York

1801 N. York

3. Assurances founded on special custom, of these I believe there are none in this country.

4. Devises

2d 344-
268-

As to alienation by record, and special cus-
tom see Blackstone

1801 N. York

1801 N. York

1801 N. York

2d 344-
268-

A deed that is a writing sealed and delivered
A deed not delivered may exist in the same
form as afterwards but before delivery it has not

the legal effect of a deed. So that delivery is
an essential part in the perfection

The making of a deed is the most solemn
act an individual can perform, in the disposi-
tion of his property. But it is not the most
solemn act to which he can be a party.

1801 N. York

2d 344-
268-

And hence follows the rule that every one
is to be stopped by his own deed.

This rule is meant that no one shall be
permitted to aver or prove any thing against
his own deed in contradiction to it. This sup-
poses however that the party was legally capa-
ble of making it. This is no exception to the
general rule that no one can contradict his
own deed, because it is not considered as a deed.

1801 N. York

2d 344-
268-

And if it will not bind as a deed, it will not
operate as a stopper.

1801 N. York

2d 344-
268-

1801 N. York

But makes a deed of lands in which he has
an interest & afterwards purchases them by his deed
is stopped from saying that he has no interest.

Dear Sir,

nature of a seed.

at the time of making the deed.

But here we must observe, that if matter relies upon of colopped is not pleaded as such, but merely as evidence, it is not conclusive tho it is good evidence & the best that can be that is not conclusive.

But the reason to be that ^{number of} ~~was~~
consequence names unless visited upon as such.

Again No man is stopped by his own deed, but a quit claim deed, or release ^{gold} is not stopped, because the covenants in the deed do not import that he has any title, & therefore after ward to assert a claim is not contradicting the quit claim or release. But if it were said that I were well seized, or that I had title then I might have been stopped. But the effect of such deed is merely to say that the donor releases his claim ~~in the~~ ^{is} overring that he has any.

Further, when a lease is made by in-
denture the lessor is an actor for rent ac-
cording to the report's title. The reason is that
the deed of indenture is considered the act of
the lessor. But on the other hand if the deed
is a deed given made by the lessor only, the lessor
may deny his title & thus defeat the action.

The Dr of the Rowen^{say} that ⁱⁿ our case G Seed
fell the case is stopped, since he has taken the
land from the labor of this seed.

Real Property

Covenants

Matters of a deed.

1227 c. 1.

I find however that the same rule has been adopted in Eng. with regard to a mortgage.

100 29-0

100 29-0

That this cannot be founded strictly upon a deed executed by one of the contracting parties is a nice point & considerably perplexed from one of another, were executed by both parties.

When each part of a deed is executed by one party only, it is said to be interchangeably executed. And when the common form is 'we have interchangeably set our hands & seals. This avoids all open misapprehension, & a deed poll it is useless.

But in deeds of indenture it is often used when both parties ^{are} signed by both parties, but this is not used here legally. But when one party ^{alone} executes one part, and the other the part, then only is the deed interchangeably executed.

When an indenture is interchangeably executed that part which is executed by the grantor is called the original, & that executed by the grantee the counterpart.

4 Br 12

But where both parts are executed by both parties, the both parts are called original.

11 Br 116.

4 Br 12.

The counterpart alone has been holden in 11 Br 116. By a sufficient evidence of the existence of an original.

100 29-0.

Thus far as to the general matters of a deed
The Requisites

It is requisite to a deed that there be

Real Property

Question - Who may convey, & how may convey.

James to the instrument able to contract, and
a thing capable of being contracted for. In every
grant there there must be a grantor a grantee
& a thing granted.

2 Br 290
1 Cr 33

When the whole interest is to be granted
all those who have any interest in the subject
should join. Otherwise the whole interest can
not be granted.

Br 119
2 Cr 1314

On the other hand, All who are intended to
take an immediate interest under the deed, must
be said to be parties. The rule is not quite cor-
rectly expressed. It should stand thus, all those
who are intended to take any other interest than
a remainder should be parties to the deed.

Edw 313.
1 Br 221
4 Cr 14. 420

But why must not a remainder man be
a party to the deed? I take the reason to be that
the party taking the particular estate, & the remain-
der man taking ^{the same} estate, the reason of the
particular tenant is good for the remainder man.

As to the question who may convey & what
may be conveyed.

It is a general rule that all persons, who
are not under legal disability may convey. Now
if the term disability signifies merely personal
incapacity is not universal. Where a man
is under a legal disability at the time the matter of
conveyance cannot convey is another sort of incapacity
but this is not a personal disability.

2 Br 290
4 Cr

Real Property

2nd cell.

Regenerale

This rule is a rule of policy, and has been
made the rule, has assisted, but to prevent
the sale of a quarrel as it is often called, or
insurance - the maintenance.

is a rule of CP. but in for some
a stat subjecting parties to such conveyance
specific penalties, & declares the conveyance null
& void.

But a conveyance by the party deposed is
 The error, is not within the O. J. prohibition.
 Plat of Chas. not be stat. because such a conveyance will
 it too not be productive of the inconveniences which
 from a conveyance to a person an- of Roberson.

But the Deceased owner of Land, is not
deprived of his right to convey unless the prop-
rietor is. The Deceased is adverse to his Goods.
He must be deposed or removed as soon as

This is perfectly reasonable. For if it is in
possession of B's land, we must deem it B's title
is not in dispute, & therefore the sale
of his interest is not the sale of a quarter.

2nd 290 Hence also the reversion or remainder
sub. or be granted the another is in possession
of the land.

The rule is the same when one is in
possession of another's land claiming under the
same.

Real Estate

Residence.

Eccle.

And it has been determined in this state that the rules do not apply to sales by the state. E 221.

Now does the state extend to a sale by the executor or administrator under the order of a list of debt. The reason is twofold. 1. The executor is bound to sell and acts in accordance with the list. Therefore he cannot be said to be dependent because he must be said to be the owner.

The same rule extends to guardians of the person of their wards, in pursuance of a decree of the court of Ch.

72. So also collectors of taxes may sell. 1st 491.

The case upon which the text is laid, that the owner is not, because he acts by order of law.

And when a mortgagee is in possession of the premises does not prevent the mortgagee from selling the interest. This indeed is similar to the case in regard to the executor.

But our text has gone further & said that where the mortgagee denies the title of the mortgagor & holds adversely to him, yet the mortgagee may dispose of his right to a third party. The reason is that it is placed in the mortgagee too much in the power of the mortgagee. For the mortgagee would otherwise become in no power to hold it as a depositor, & then if the mortgagor could not redeem, he could not sell or otherwise dispose, which might be very inconvenient.

Sanjour
Washington
December 1880.
2nd 491

Gard

Harris

Sept. 12 1818.

In the case conveyed by deed

Both respect to impacts, they under certain de-
 2 Bl. 6291. qualifications, which render their deeds sometimes void
 4 Bl. 12. & sometimes, variable only, for which see the latter
 Books & Briefs

Idiots & Lunatics are strictly not capable by law
 of executing valid deeds. They are however not totally
 void, for at 1 Bl. an idiot or lunatic can assign his
 own land, or land in other words, one can own land
 himself. The reason appears to me generally.
 One is that the idiot could not know what he did,
 that other persons care, & that is the evidence
 given. Another is that a man can counteract as
 sanity. This is true, but in it very difficult to
 do so. And there seems to be no danger in this
 more than in any other person. There is no gain
 which there was not in debarment.

The 110.

Bl. 6291

Little 1 105

2 Co. 123

Gard 16

1 Bl. 221

2 Bl. 123

Tibb 202

1 Bl. 2

Bl. 123 4

2 Bl. 291

1 Bl. 43 44

2 Bl. 414

478

This is a rule of 6 Bl. But the propriety of
 the original enactment is very questionable. But it
 is now settled that he cannot avoid his deed
 of fraud, insanity. But to all other purposes
 however his deed is invalid, & that he cannot here-
 after avoid it, yet the law was in his behalf.
 even during his life. He being considered as guar-
 dian of idiot & lunatic. When he grants another
 the committee of a lunatic may so the same
 thing, the com. is same one who acts as
 guardian. I am not however certain. For

Real Property

Who may convey by deed.

Deeds

And on the death of a lunatic his heir or administrator may avoid the deed. But an idiot can never have an executor.

If then an idiot or lunatic ^{him} ~~not~~ ^{real} ~~not~~ ^{of personal} property his heir or may avoid it. ^{Test 241} ^{4th 20.} ^{1st 115}
his personal representative

But one who is merely prying in estate to an lunatic or idiot cannot avoid the deed ^{4 B 124} of the former. For he is not the representative ^{8 Ld 43.} of the lunatic but is a stranger. Here the deed is not void but voidable. If it were strictly void any person could avoid it, but where it is voidable only the representative ^{10 B 124}

But if an idiot or lunatic buys a fine ^{4 B 124} or suffers a common recovery, it will bind not ^{2 B 124} only himself but also his representatives. ^{12 B 124} as on the ground that nothing can be averred against the record, not because he is capable of buying a fine or suffering a recovery.

The rule that a lunatic cannot contract his own deed has been contradicted in Ben. both as it respects personal & real estate. The doctrine is then here exploded. ^{9 B 124}

If on the other hand one who is not sane yet makes purchases an estate, he may recover it, has several ways of doing so.

Real Property

Deeds

1. P. 2

2. P. 292

Who may convey by deed. does so, no one can avoid it. But if he dies before the recovery of his senses, or refuses to assent to it, his heir or representative may then avoid it.

But the person conveying to him cannot by his own defect defeat the purchase. The grantor after the recovery of his senses to may assent or dissent, but the grantor cannot, defeat the contract by saying the grantor was not competent.

2. P. 292

3. P. 292

With regard to a feme covert I must refer you to the title of baron & feme, and in general the deed of a feme covert is void.

5. P. 292

2. P. 292

If one is compelled by duress to make a deed, he may either affirm or avoid it after the duress is removed, it is the same in this respect whether he be grantor or grantee. There is not that free consent here which the law requires as essential to the validity of the deed.

3. P. 292

4. P. 292

5. P. 292

6. P. 292

7. P. 292

8. P. 292

If the deed is made by several persons who are legally capable of conveying, & others not, it may operate only with regard to those who are capable. If there any person who has an interest even in a conveyance with one who has none, the deed will operate for them as if he were capable of conveying who has the interest. It is also with respect to grantees, those only who are capable of receiving, may take by the conveyance.

Deeds.

Who may be grantors

All persons in general of the B.C. may be grantors or take & give, but some are subject to special limitations. They are incapable of granting but they can take for their interest. As all laws respecting them are for their interest, to guard them from imposition they are therefore capable of purchase but not purchase as liable to defend.

An adult is a purchaser is always presumed till the contrary appears. Both as to a conveyance it is not so, for if it is made a conveyance during his minority, if he does not after actually reach it, it will not bind him. If a conveyance is made to him, it is otherwise so act is necessary to get in make the deed.

18th 22.
3d 1861
112a
2d 22.

An alien may also at B.C. be a purchaser by deed but he cannot hold against the crown, for upon advice given, the land conveyed to him will vest in the king.

18th 22.
2d 22.
4th 22.

An alien friend however may hold a lease for years of a house for the convenience of merchandise. This is founded purely on commercial policy.

Both as to purchases by aliens the law is for sellers & not for grantors. The law is for the seller & not for grantors.

Real Property

Goods.

Who may be granted.

The Gov

1870

Sept 27

lands without permission from the government. So that here the title would not pass out of the grantor. The stat contains an exception with regard to those British subjects who held lands before the revolution, & to such French subjects as are entitled by the treaty with Louis 15.

But the legislature always comply with any request for permission to purchase by others.

This prohibition cannot extend to those alien as have been naturalized under the laws of the U.S.

1 Bl. 499

4 Cr 25

2 Bl 220

By certain laws state alienations in most cases are in some cases absolutely prohibited & in some very much restrained.

In Eng^d there are no such laws, & most corporations may there purchase lands. But there is however a stat which provides that it can hold all lands granted for support of a university, school, or other p^{ur}pose, or for any public or charitable use, shall always remain in such uses, so that they are unalienable.

But this stat has been evaded by very long leases for a sum in gross so that in fact every land conveying lands unalienable will be.

Consideration

The present rule of the Eng. L. is that the deed must be founded upon a lawful & sufficient consideration. It appears however that by the ancient law ~~no consideration was requisite~~ as it was not necessary to convey ^{the consideration} ~~the~~ in a deed as the solemnity of the instrument implies one; therefore the deed was just as good as if there had been none as if there had been one, so that practically no consideration was requisite.

2 Bl. 296

Howe 338.

4 Br. 24.

But under the law of uses a deed without consideration is said to ensure to the grantor ^{benefit of the} unless the use is limited to a third ^{person} ~~person~~.

This rule does not go upon the ground that the whole interest ^{remains} ~~is~~ in the grantor, so the legal title vests in the grantor, tho' the use is of a conveyance implies that the grantee ^{holds} ~~holds~~ in trust for the grantor, the grantee holds the legal estate subject to a personal interest in the grantor.

230.

135

231-2

327

Bl. 330

As since the stat. 27 H. 8 has executed the use of a deed ^{without consideration} is said to ensure to the use of the grantor & law so that there ever the legal title ~~was~~ ^{is} in the grantor, so that the whole interest is in the grantor.

By executing the use as meant, to transfer the legal title to a trust it is held that by the law doctrine of uses, engaged the

Real Property.

Deeds

Consideration

Beneficial interest. So that if this state the deed goes with the beneficial interest. It deprives the deed without consideration of any effect at all.

But the rule is laid down thus generally that a deed without consideration ensures to the benefit of the grantor only, yet it seems very questionable whether it applies to any other than that of bargain & sale. Now other deeds may be as the consideration of knowledge or experience. But a deed of bargain & sale requires valuable consideration.

12th Jan 22.11

15/1/22 10.10.11

16th Jan 18. 351.

12th 295.

16th 11.11.11

2nd 24. 308.

16th 11.11.11

On Eng a deed declaring no more to the grantor. If then makes a conveyance to B without any use stated, it ensures to the benefit of B.

It is questionable whether in this state a deed without a consideration is not good for the doctrine of user was never received here. And if this was what made a consideration necessary, it would seem that there need be no consideration of price. But the practice is always to insert a consideration. I think they would not be good without, in analogy to the rule of 8th, respecting other sealed instruments. They are good without a consideration of price.

Consideration in the case of Ben

Real Property

Deeds

of two kinds good & valuable

A good consideration is natural affec- 2 Br 25.
 tion between the grantor & some near relative. 2 P.W. 59.
 But I believe that the relation must be as near Robt on Trans-
 as nephew or niece. But to this there is an ex- 2 Br 129.
 ception, where the conveyance is to the heir at
 law, this is good tho' it is not nearer than
 fifteenth cousin.

A valuable consideration is one, in 2 Br 39. 483.
 which there is some pecuniary value 10 Br. 2. 331
 1 Donbl 329.

74.

But marriage is always considered a 2 Br. 297
 valuable consideration. 2 Br 24.

A consideration either good or valuable
 will support a deed as between the parties and 2 Br. 297.
 their representatives. But a conveyance on a con- 2 Br 59.
 sideration merely good is void as being fraudu-
 lent against the creditor & purchased for a valu-
 able consideration.

The consideration expressed can never 14 Br. 340.
 be denied to the party or his representative 2 Br. 295.
 the deed is void then. 1 Br. 40
 1 Macr 479.

But the grantor or his representative
 or other party to a deed may impeach the consid- 2 Br 109.
 eration for illegality, even tho' it does not appear 2 Br 324.
 to the court. In such a case the gran-
 tor may avoid the deed. He may prove the
 wrong ab initio.

Real Property Consideration

Deeds

9 Good 294. But language is not so strong as to
 the of hand purchases may, and the consideration is not
 in the deed, the the parties cannot.

15 18 19. It is not necessary to be an direct and
 2 D. 46. 7. consideration is considered as so, and the con-
 7 D. 59. sideration is at all. For the judges cannot here deter-
 3 D. 26. mine as to the sufficiency of the consideration.

6 D. 154. But here the grantor may aver, prove the
 6 D. 294. actual consideration. And this neither contra-
 dicting nor adding to the deed by parol evidence.

16 14 a. Again where lands were limited to
 14 29 a. for years, remain to B & C for 2 years, and re-
 2 2 6. ceived a deed, an averment was admitted that the
 deed was made as well in consideration of
 marriage between B & C as for the L's received
 from A. This seems a little like adding to a deed.

It seems to be implied from the au-
 thorities cited for the last rule, that if the
 deed mentions no consideration, or may be a
 need & have. For if the deed is expressed to be
 for L's and yet no consideration, which is a
 here were none, you have seen the true con-
 sideration may be averred and proved.

78 18 19. If the deed is given, no consideration, but
 78 18 19. appears from the deed, that the conveyance
 is to the wife held, or other next relative, the
 deed implies a sufficient consideration and
 will be a need or prove.

Consideration. Real Property.

Deeds.

For it is a general rule in the construction of instruments, that what is sufficiently affirmed by necessary implication need not be averred or proved.

But if in such a case a specific consideration be conveyed in the deed, no other can be implied; as if the grant be to B the son in consideration of £50 a good consideration cannot here be implied from the relationship that appears. For *ex precepto facit cessare taci* - 1 Br 1826. And where it is a covenant to stand seized to the use of B it would not be good, for this covenant can be only upon a valuable good & necessary or a valuable consideration.

The acknowledgment in the deed of the receipt of the consideration is not conclusive against the grantor. It is a mere matter of form. This has been settled in Con.; but I find no direct authorities on the subject. 1 Keat 299.
2 Br 99.
Prace & Cation
Day Kepp

3^d. The deed must be written or printed, & it is said on parchment or paper. But it may be written in any language or character. 1 Keat 299.
2 Br 99.

Formerly a writing was not necessary to convey land. But now by 25 Ed³ 2. no interest in land, can be created without writing for more than three years. 2 Br 299.
210-215.
Robt stat
Hand 240-7.
1 Mac 72.

And the deed must be written before sealing & delivery, a rule peculiar to deeds. Hep 54.
Berke 118.
2 Br 26.

Real Property.

Deeds

Parts of a deed
Other instruments not sealed need not be. If one
seals and delivers to another a blank paper
authorising him to fill it up as a deed, he
will not be bound. For the deed takes effect
from the time of delivery & as delivered.

1 Brs 225. 4th. The subject matter must be legally set
4 Br 32.33. forth, tho' it is not necessary that the usual
or in which the parts usually appear
should be observed.

There are eight of these formal or
orderly parts of a deed.

1st The first is the premises. This institutes the
2 Br. 248. names of the parties the recitals, the conside-
ration, the thing granted, & the exceptions, &
ends all which precedes the habendum.

Tho' the omission of the ^{grantor's} name
in the premises does not vitiate the deed if
his name is in the habendum. And if he is
wrongly named in the premises & rightly in
the habendum, the former may be rejected
as surplusage.

Step 70
East 115:
1 Br 7.

Inst 341
10 Mod 42.
4 Br 414.

And it has been further deci-
ded that where the name of the grantor
was omitted in the operative part of the
grant, & the consideration was expressed to
have been paid to him the deed bound
the grantor. This is a laudable liberality
and is found in the construction of deeds.

Real Property

Deeds

And if the grantee has a wrong name given him, but there is such a description as identifies him clearly, the deed is good. The reason why a mother eve initials a deed is the uncertainty. But here there is none.

So if a conveyance be to Elizabeth the wife of A & her name is Jane she will take. So if the deed be to the wife of A merely she will take. For here constant de persona.

But in general a mere clerical mistake will not destroy a deed, this may be explained as where there was a reference to another deed & a mistake of a figure.

But in general a grant to one by his Christian or his name only is void for uncertainty.

But a name acquired by common reputation is sufficient to enable the person to take by deed. As where an illegitimate child acquires a name by reputation.

A person may be described in a deed without either of his names, & he will take under this description. As if the estate be to the eldest child of J. S.

Finally the word issue is a good description. And the legal descendants will take. The word issue is equivalent to child or children.

The first of these is the fact that the
 system is not a simple one, but a
 complex one, involving many factors
 which are not yet fully understood.
 The second is that the system is not
 a static one, but a dynamic one,
 which is constantly changing and
 evolving. The third is that the system
 is not a uniform one, but a
 heterogeneous one, with many
 different parts and components.
 The fourth is that the system is not
 a closed one, but an open one,
 which is constantly interacting with
 the environment. The fifth is that
 the system is not a simple one, but
 a complex one, involving many
 factors which are not yet fully
 understood. The sixth is that the
 system is not a static one, but a
 dynamic one, which is constantly
 changing and evolving. The seventh
 is that the system is not a uniform
 one, but a heterogeneous one, with
 many different parts and components.
 The eighth is that the system is not
 a closed one, but an open one,
 which is constantly interacting with
 the environment. The ninth is that
 the system is not a simple one, but
 a complex one, involving many
 factors which are not yet fully
 understood. The tenth is that the
 system is not a static one, but a
 dynamic one, which is constantly
 changing and evolving.

Haberburn

real property

L. & C.

In the event of a sale the habernum becomes
 a condition which governs the premises.

August 2, 1911

The office of the habernum is to regulate the quantity of interest, that is, is restricted interest in the premises, the not usually.

When the quantity of interest is expressed in the premises it may be restrained enlarged or qualified to the habernum. Thus if the words are given grant to A & the heirs of his body habernum to his heirs forever, here the grantee has a fee tail, with a fee simple in expectancy.

Gr 7490
 2nd 290.

6. Also it has been held that the same rule applies, if the condition in the premises were a fee simple & the habernum a fee tail,

2nd 1119.
 Gr 7490.

The latter rule does not appear now, & the better opinion seems to be that in the latter case the grantee would take a fee tail, for it is the office of the habernum to regulate, that is, to contain in the premises, but the premises do not control the habernum.

8 P 154.
 1st 21. 222.
 2990 83.
 2nd 35.
 4 Co 154.

So that remark as to the habernum restraining the premises is -

8 P 154.

But where the habernum is totally a payment to the premises, it is void - pro tanto if in part.

8 P 65
 2 Co 25.

The general rule in deeds is that where there are two clauses referring to each other, the first clause controls the second.

2nd 154.
 1st 153.
 2nd 30

Real Property Deeds

Parts of a deed.

1. *1874*
2. *1874*

The amendment was somewhat to copy the
tenure by which the estate was held.

3. *1874*

But now it seems that the amendment
is of no use the still tenure. There being no dis-
tinction of tenure it is now useless.

4. *1874*

5. *1874*

After these follows the addendum
expressing the terms on which the grant is made.

Thus if the land is granted to the grantee
upon his using and the latter clause is called
the addendum or reservation.

6. *1874*

7. *1874*

8. *1874*

The next ordinary part is the condition
if any, for which see the title of book.

The next part is the warranty, in which
the grantor for himself & his heirs warrants the
estate to the grantee & his heirs, & if the grantee
with such warranty is evicted the grantor is
bound to it is given him lands equal in value
to those first conveyed.

9. *1874*

10. *1874*

11. *1874*

12. *1874*

13. *1874*

14. *1874*

The grantor is compellable to do this by
a voucher, or by an action on the warranty.

In modern practice however warranties are
divorced from superadded covenants.

These covenants are agreements by which
the parties stipulate something in favor of the
other. So that he shall pay rent, has a right to
convey. They are infinitely various, whereas a
warranty has only an appearance.

Deeds

The usual covenants on the part of the grantor in deeds of conveyance except those as to release are two 1st that he has a good right to the land 2^d that he will defend the title against all claims whatsoever. This is called the covenant of warranty.

See the
Covenant to

The principal difference between a warranty & a covenant is that the latter former binds the grantor & may be his heirs to defend the lands, but does not give us personal representatives, the covenant however not does not bind the grantor to insure other lands in case of encroachments or injuries to damages by which the personal representatives are bound.

1. Deeds 3, 4, 5
2. Deeds 5, 6
3. See the Coven. 3
4. Deeds 49, 50, 51
5. Deeds 11.

The land is described by metes & bounds & conforms to the description. The grantor is not bound by the covenant, the land should fall short of the quantity or proper. In such case there is a description by metes & bounds. The former prevails however. The grantor may take a special covenant as to the quantity.

2. Metes & Bounds 551
1. Deeds 52, 53
2. Deeds 2, 3
1. Deeds 505.

The rule is the same where the deed is any other deed or record or instrument and a description of the land.

2. Deeds 2, 3.

When the metes do not compare with the monuments or monuments the latter will govern in reference to the length of line.

Real Property

Deeds.

It would here remark however, that a house
 does not appear to be immovably in the same man-
 ner as the land of which it may be taken in evidence, &
 if there is a total uncertainty, ought to be given.
 This rule is supported by a late decision in *Case*.

The length of line or monument will often
 govern in preference to the quantity.

1. 2. 3. 305.

But if the description be by quantity
 and the grantor is liable if the quantity is not
 equally to that described.

But for the purpose of possible liability
 it is usual to add after the descriptive words
 of quantity the words more or less by which the
 grantor ceases to be liable if the quantity does not
 conform to that described. These words are now
 more generally inserted & have become in some
 cases a mere form & have no effect where metes
 & boundaries are used to designate the land.

The next formal part of a deed is the con-
 clusion, which mentions the ^{year} & date generally.
 But the date may be in the beginning.

The date is in the beginning no part of the deed
 itself it is a mere memorandum of the execution
 of the deed. Formerly ^{deeds} ~~deeds~~ were never dated but
 they are now generally, as a matter of convenience
 they were first dated about the 15th or sixteenth
 century. A date then is not even now an essen-
 tial of a deed, and a deed is just as good

{ John Mills
 4. 3
 1. 2. 3. 305.
 2. 3. 3. 33.
 2. 3. 3. 33.

Real Property

Deeds

without a witness one. But it should never be admitted
as it is a matter of great consequence. If there
is an impossible or wrong or no date the execution
may be proved by parol evidence

1 Br 415
2 Cr 28
3 Cr 21

The next requisite to a deed is the reading
of it. If either party desires the reading of the deed
before execution it is necessary. And if he does desire
it, & it is not read the deed is void as to him,
but if he can read it himself & does not he
cannot object that it was not read to him upon
his request. But if the party desiring to have it
read, is unlettered or blind, if it is not read to him
the he executes it he is not bound by it. But
whether he can read it or not it does not make
the matter, it will bind him that it be not
read to him.

2 Cr 305
2 Cr 419
11 Cr 21
2 Cr 27

If the deed is read falsely as it will
be void at least as to the party read, & as the case
may be in toto. It is void only as to him who
it reaches however. For if he after knowing
the deceit chooses to hold to it, & take it in
er it, the other party ^{is} ~~being~~ bound by it. It is
not strictly void but voidable. But if the party
who has it read, has it falsely read by collusion
altho he was unable to read, still he is bound
by it. No man being permitted to take advan-
tage of his own fraud

2 Cr 69.
2 Cr 90.
2 Cr 27

Real Property

Quia.

Section 10
 Chap. 10, 11

The next requires no sealing.

Sealing an instrument is a solemn act. It will not take effect until delivery. It is not then necessary at all to seal a deed by the state of Georgia as now in most cases necessary. The act is so at all. But there is no instrument so introduced into writing as now. But there is no instrument so that sealing was substituted for signing.

But whenever the subject is written the state of Georgia is signing is necessary.

But it seems a question in Georgia whether sealing is requisite to a deed. Any written contract containing an express covenant, having been there de termined to be a deed.

Sealing is now a mere form. It is formerly was so, as each person was obliged to seal. But now seals are always needed. It is a probable that they are not needed.

In Georgia signing is necessary to every deed of conveyance, not only by the state of Georgia as but by a particular state relative to the conveyance of land. And in this state sealing is not

One person may appoint another his attorney to execute a deed for him. But it must be done in the name of the principal.

The common mode of executing a deed is in the name of C. his attorney, and it is necessary

2 Ka 400

2 Uls 400

2 Ka 400

2 Ka 400

2 Ka 400

2 Ka 400

2 Ka 400

2 Ka 400

If the deed is not executed otherwise than in the name of the principal it will bind him, although not the principal. And if it is executed by an attorney principal it will bind him as such.

It is a rule that an attorney cannot bind his principal by deed, without a power by deed.

The instrument which gives another a power to bind a person by any instrument, must be attended with the same solemnities as the latter.

As a man cannot be bound by a deed without observing the requisites of a deed, so he cannot oblige himself to be bound by such a deed but by observing the same requisites.

This rule contemplates the absence of the principal, for if one executes a deed in presence of another binding them both, it will be held valid against both.

That the rule is thus limited must be apparent from the necessity of some cases.

For if one person could not in the presence of another & his direction bind him, by deed, if that person were physically unable to appear a real he never could be bound by deed.

The same rule respecting the power of the attorney, holds also between partners in trade.

Each of them has a right to act for both as far as concerns their trade, but if one partner binds them by a deed he must be

105 }
9 B 5
10 B 151
Phil. on Bail 7
24, 25, 26, 27

10 B 52
10 B 207
Com. in 10 B 2
Stanger 10 B 1
10 B 213

10 B 213
Att. on Resp
218
10 B 505

Real Property

Deeds

57 R.R. 207
(4 & 91)

invested with power by deed. Unless indeed the other party or parties are present.

18 20.

18 20.

If several persons are named as grantors & one of them only seals or executes it, it is his deed, & his alone.

2 18 207

To give operation to a deed, there must be a delivery. The act as to its form & structure it is consummated by sealing. And therefore the form of attestation is sealed & delivered.

2 18 207

18 207
(12)

And whatever may be the date of a deed, it takes effect from the delivery.

18 207

Hence also if a deed is made & dated in a ~~man~~ during his minority, but delivered after his attaining full age, it will bind him.

18 207

2 18 207

If a third person affixes the seal, but the party himself delivers it, he adopts the seal & is bound by it as his deed.

18 207

And it is indispensable that the sealing should be before delivery, since it takes effect from the time of delivery. Therefore it must be sealed when delivered.

18 207

18 207
96 107.

The act of delivery, without words is sufficient to constitute a good delivery.

18 207

18 207
(12)

So on the other hand a delivery may be by words only, without any act save by the grantor. As if the grantor pointing to his deed and saying, "take it as my deed."

the page
 4 Br 28
 2d Ed. 58
 Com. in
 title 2d. & 3d.
 1d. 140.
 2d. 140.
 3d. 140.
 4d. 140.

part of the grantee take the deed after making
 without actual delivery, & without the grantor's
 express direction or consent, it is no good legal de-
 liver, unless it be proved that the deed was laid
 down it was with the intent that the grantee
 should take it.

A presumption of delivery arises from
 a forcible seizure of the deed or of the sub-
 ject of the deed.

Can Can where deeds are acknowledged before
 a magistrate, such acknowledgment is prima facie
 evidence of delivery.

A deed may be delivered to the grantee,
 8. onto any other person having authority to receive it,
 or to a stranger in behalf & for the use of the
 grantee.

With regard to the effect of delivery under
 various circumstances, there are many important
 distinctions to be observed.

1st A deed cannot be delivered to any effect more
 than once. By this it is meant that only one
 delivery can be operative. If the same delivery
 a deed at two different times if the first
 has any effect the second will be void.

Suppose the first delivery were voidable
 the second delivery can have no effect, or no
 other than confirming the former, but as a
 new & clear delivery it is void, it is a mere gift.

Real Property.

a former delivery.

Sh 60

Park J 184.

Comp 201.

9 Bur 1883.

But on the other hand, if the first is strictly void the second can take effect. As a delivery by a feme covert make a delivery it is void, even if after her husband's death she make a second it operates as a new valid delivery, & does not operate as a mere confirming act, as the first delivery is a mere non. entity incapable of being confirmed.

Sh 60

Hence also if a deed once delivered imperfectly, becomes void afterwards as by losing it, & a second sealing & delivery will make it good, & the second delivery will operate as a new deed.

Sh 60

Park J 184.

Ches. Mr. Wille

Said. W.

On the other hand if a minor or one under duress delivers a deed & after full age, or freedom delivers it again the second is good for nothing as the first is merely voidable, & not void, it is his and if not afterwards avoided.

But in both these cases the second delivery operates as a confirmation of the first.

These rules seem according to their terms run upwards, to the effect of the second delivery but the title does not take effect from the second delivery but from the first, therefore the second does not take effect as an delivery but as a confirmation of the former delivery.

Real Property

Deeds.

Delivery may be either absolute or conditional. ^{Future}
 If a deed is delivered to a stranger, in order to ^{be} delivered to the grantee upon the performance ^{of some condition or happening of some contingency} the delivery is conditional. But if it be to the party himself without condition it is absolute. Sug. 58
Sh. 58
4 Co. 20.

In the former case the instrument till delivered over to the party is called an escrow. It is not till then the deed of the party. But if it is delivered over before the contingency happens the deed does not bind the party. On the performance of the condition, it may be delivered over and it becomes binding. Det.

A bond or covenant ~~is~~ an ^{or} a promise a deed ^{is} a note delivered to arbitration to be delivered over to the prevailing party is an escrow.

It seems settled that if the grantor in delivering an instrument to a stranger to be delivered over on condition, says I deliver this as my deed, to be delivered over as the deed is absolute & binding from that time, tho' the contingency never happens. Had he said he delivered it as his escrow, the rule would have been different. The rule at present is about which defeats the intention of the grantor but it is settled. Sh. 59.
Perk
2 Co. 20.
9 Co. 109.
Com. 61.
Sh. 59.

When upon performance of the condition the deed is delivered over, this delivery is

Real Property

Deeds

absolute & then the instrument takes effect as a deed

I find the rule laid down generally, that if after performance of the condition, the donor has refused to deliver over the deed the title still rests in the first delivery. This is true in some cases. But I doubt whether it is in all. It is true when the person who first delivered the instrument has come under some disability.

In other cases the rule holds when the second delivery would be of no use.

I doubt whether the rule applies to any cases except those where the deed would fail of effect, were that not the rule.

In ordinary cases where there is no intervening instrument to the grant or disability of the grantor it takes effect only from a second delivery.

In case of necessity then, as where there exists an impediment at the time of the second delivery or of the first the deed shall take effect by second delivery in relation to the first or not as the case may be under magis valeat quam pereat.

But suppose the trustee refuse to deliver the deed, when the contingency happens what is to be done. The grantor may go to a Chancery. If there is no impediment to the second delivery there is no necessity for the rule that the deed shall take effect from a second delivery.

Hef. 59.

58 35 6

58 84 6

98 35 6 37 2

Hef. 72

58 35 35

Real Property

Deeds.

If a feme sole delivers a deed as an escrow, & then marries, & the contingency happens, the second delivery binds her by relation to the first, ut res magis valeat quam pereat.

Br. Chas. 447
Hep. 42.
3 B. 356
Hill 423.

This is from necessity: the deed could not otherwise take effect.

Again if one delivers an instrument as an escrow & dies & the contingency happens a second delivery is good by relation. For otherwise the deed would not take effect. In these cases no second delivery is necessary.

Br. Chas. 447
3 B. 356
5 B. 346
Hep. 59

Where a second delivery of the deed by the holder would be of no effect, per formance of the condition perfects the first delivery, which was before inchoate. But where the second delivery would have effect it should be made.

Again when the grantor delivers the deed as an escrow to ^{be delivered on} take effect upon the death of the grantor, it takes effect by relation even the first delivery, and whether there is a second or not.

1st.
1 Root. 150.
2 B. 353.
Held in Carter v. Day

The death of a party who has created a power of attorney by deed regularly revokes the power. And this creates the necessity that the second delivery should bind by relation in the last case.

Again if a person of a sound mind delivers a deed as an escrow, & becomes non compos

Br. Chas. 447
Hill 423.

Real Property

Deeds

if the contingency happens, the deed takes effect by relation without a second delivery. The second delivery can here have no effect.

To suppose a person of sound mind makes a deed of feoffment, & executes a power to a third person to make livery of seisin. And then becomes non compos & livery is made. The deed is valid, the livery acts by relation, otherwise it would have no effect.

P. 4

Lect. 50

1 Bac. Ab. C.

Deed 138.

1 Mo 52.

Thes 209.

But on the other hand if one executes a power of attorney to a person authorizing him to make a deed of conveyance after his death; or livery of seisin where he has made no feoffment, the execution of the power has no effect.

There is a difference between a conveyance made & performed after the death of a party & the original act done at that time. The former is valid. But the latter has no binding force. The power of attorney to make a deed is not an incomplete act. Where the execution of the power is a new consummating act, it is by fiction considered as performed at the time of the original act.

Thes 42.

By the application of the doctrine of relation would defeat the deed the doctrine will not be applied, & the title vests if at all from the second delivery.

20 856

1 Br. 286

Croley 44

Thes 89.

Thus if a person dies makes a deed to a person acting as a trustee, as an escrow to be delivered over on the land & the third person

Liens.

enters & delivers it over, the doctrine of relation will not be applied. For then the deed would be defeated & the title vests if at all from the second delivery.

This rule cannot however operate so as to violate the privilege of a person who was under legal disability at the time of the first delivery.

As if a feme covert makes a will & delivers it over as an escrow & the contingency happens after coverture & then there is a second delivery, this second delivery does not bind her. The time is the same as to an infant, when the contingency happens after the grantor is of full age.

The second delivery cannot take effect by relation.

When a deed takes effect upon a second delivery by relation to the first, it still takes effect, so as not to affect collateral acts.

This rule is merely in amount, that the second delivery acts retroactively only to vest the right or title & not to any other purpose. It vests the right or title from the time of the first delivery. If a bond is delivered as an escrow & the second delivery operate to give it effect by relation, still a release of all demands between the time of the first delivery & the second, is no discharge of the bond.

I conceive that the retroactive operation can never make an a trespasser by relation. It can make a deed of conveyance, and deliver it as

Don Dyer an accow, & the contingency, & the deed is
 Confirmed. The grantor is not a trespasser nor
 can he be made accountable for the rents and
 profits. There are collateral acts. A fiction of
 law never works an injury. It never makes
 the location which was not so originally.

2 Root 22
 2 Leonard 235
 3 Coke 26.27
 1 Strong 116
 7 A.C. 138.9
 4 Key 395

When a deed is delivered to a stranger to be
 delivered to a grantee, there being no condition, the
 grantee is presumed to accept till the contrary
 appears. This has been here decided but I find
 no Eng case expressly in point.

If the grantor knows of the delivery
 there is no doubt. But I speak of a case where
 he does not know it.

88 117-6

31. 117-6 contra
 * Doctum R. v.
 Co 230.
 2 B. & S.
 50. (70)

If a deed is delivered and the
 grantee or tender refuse to accept it, he cannot
 afterwards claim it. The holder is then deemed
 a trespasser. But if he then delivers it the grantor
 may plead non est delivery. However a redelivery
 may grant the deed by the grantor & will be good
 as a new delivery only if it is a simple contract &
 makes an offer.

3 L.R. 65
 P. E. 332
 * Leg. System of Pleading

Looke thinks a non est factum is not a proper plea

Real Property

(Cont)

It is settled by authority, I believe that a deed cannot be delivered to the grantee himself as an escrow.

But upon principle I can see no objection to it.

The delivery must always be proved in a parol, and I do not see the reason why a conditional delivery might not be proved, as well as an absolute one.

But however the authorities appear to establish the rule.

The last part of a deed is the attestation, i.e. the execution of it in presence of witnesses. This description seems harsh, correct - the attestation of the witnesses is their act.

This is the last part, but it is not a requisite of a deed.

Commonly, the attesting witnesses did not subscribe their names but were merely present, but it is now otherwise. Their names are necessary at least, tho the proof is more convenient.

After the Statute of 1547 however all leases & mortgages of houses & lands must be made in writing. It is a fact that all leases for more than one year must be attested in the Statute of 1547. The Statute of 1547 only requires the subscription of the parties.

Lecture

January 1, 1817

L. 59.

6th Ed. 10. 84.

2d. 121.

2d. 121.

1st. 121.

1st. 121.

1st. 121.

1st. 121.

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1st. 121.

Real Property.

Deeds.

It can be
Title Entry.

2d 57, Iowa
elect
under 658.
not known

2d

2d 57
1st 1st

Auth 346
1st 500
2d 57
2d 275
1st 23
1st 66
1st 758
3d 646
1st 55

These are all the requirements on the part of the
ceremonies all requires. As for example grant
of lands & houses must be made before a
particular magistrate, justice of peace or they will be
invalid. (This is of course for life or for
years) That a deed must be so acknowledged as
they will be valid only against the grantor &
his heirs & not third persons.
Deeds of sale ^{or mortgages on lands} must also be recorded at length in the
records of the county where the land lies to be valid
then valid. The effect of this act is that every
person knows where the title of all the land
in the county is to be found. This is the custom in most of the U.S.

The title as against third persons is in
general complete & effectual. When the grantor
has sold the land ^{between himself and purchaser} the grantor
gives a note is the clerk will hold the same
in evidence even a note does. This will however
if only given upon a note, & does not hold if the
grantor purchaser has not the delivery to pro-
cure his deed to be recorded. That is by presenting
his deed in a reasonable time. So that it is
the duty of the grantor to have his deed record-
ed as soon as possible. The person, the rule is 30 days after the
deed is in a reasonable time now
determined by the circumstances of the case.
It is required that the deed be recorded in the county where
the land lies. The law is to the contrary.

Deeds.

But if the prior grantee having lodged his deed in season, and without this being recorded at length, it is as if he had so afterwards, since, ^{Mass. 81.} our records recording will not have relation to the first assignee, against an intermediate grantee.

But if a prior deed lodged in season is pre-
vented from being recorded by the subsequent
recording of the grantor, it will after the law
be held in preference to such subsequent ^{Mass. 110}
recording, ⁵⁰⁰ since it is the first recorded, since ^{Mass. 110}
the first grantee has done all that he could. ^{2 Root 299.}

The same rule holds if this deed is not
recorded from the negligence of the clerk.

And it is said that a subsequent deed
if first recorded shall hold in preference to a
prior deed not recorded by negligence, where the sub-
sequent purchaser had actual notice of the first
purchase.

Take the true rule to be that the sub-
sequent grantee shall hold as long as he acts
in good faith, and that very knowledge, which
the recording was intended to afford, he cannot
in conscience retain the deed, & therefore ^{Mass. 81}
such rule can well be said to give the true
priority. ^{Mass. 81}

Mass. 81.
2d ed. 1845.
3d ed. 1847.
4th ed. 1849.

Real Property.

Deeds.

10 June 1857.

But it may be asked, that since the construction should be the same in all cases, it does not follow, why is that so? In truth there is no difference in the construction of the deed, but as we cannot in good conscience hold a deed to be correct from a trustee, & will correct him if necessary.

2 June 1857.

It is the duty of the Clerk to record it at length, & if he delivers it back without recording it, at the request of either or both parties he is liable to any person who may be injured thereby.

It is his duty to keep the deed well recorded on file so that all persons may see it & if he conceals it he is liable to any one who may be injured by such concealment.

There has been the request.

How a deed may be avoided.

2 June 1857. If the ~~deed~~ ^{instrument} is one of the essential requisites it is not a deed tho' it may operate as an executory agreement, as the case may be.

2 June 1857.

And the deed may be destroyed by erasure, interlineation or any other material alteration.

2 June 1857.

But an erasure or interlineation made before delivery, will not destroy the deed provided a memorandum be made. But this is not

Real Property

Deeds.

Can in Can. it is now a question for the jury.

It is afterwards after delivery certain rules are to be observed.

Any alteration by the grantee after delivery by the grantor, whether material or not, totally voids the deed. 11 B & 294. 2 Roll 29.

And even tho' the grantee makes an alteration against himself or in favor of the grantor the effect is the same.

And tho' the deed contains several distinct & absolute covenants, if he alters one or then the whole become void. 11 B & 294. 2 Roll 29. 2 Roll 29.

But as the other have no alteration by a stranger does not destroy the deed, unless it be of a material part. 11 B & 294. 2 Roll 29. 2 Roll 29.

But in these and all other cases when the deed is destroyed the party who made it may plead non est factum. 11 B & 294. 2 Roll 29.

But what then is the remedy of the grantee for such an alteration in his own consent. He may bring an action against the stranger for the whole amount that he has lost. But this may be far from being satisfactory, & I apprehend that the grantee may in B. compel the grantor to make a new conveyance, but there are no cases to that effect. The justice is all on the grantee's side, & it is a rule that if the deed is lost or destroyed it is presumed that the grantee

Real Property.

Deeds.

may still hold, & may prove the contract by parol. And who, not then where there has been an alteration by a stranger.

5620

Shower (under title)

deed) 28.29

1 Foulkner. 1465

A deed may also be destroyed by breaking of the seal. And if two persons are jointly bound by a deed, if the seal of one is broken off, the other will not be bound. For he does not bind himself alone, & the seal of the other being broken off discharges him.

11 B 283

{ Br Chy 510

{ Doctinal 510

{ Radcliff 259

2 2.

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

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2 Bule 248

But it is otherwise where they are severally bound.

A deed may be destroyed by being cancelled.

It may be destroyed by the subsequent disagreement of those whose concurrence is requisite to give it effect, as a deed to a feme covert, requires the consent of the husband, & if he refuses it, the deed will not take effect.

And lastly a deed may be avoided by fraud, or by a decree of a Court of Justice, as if the deed is obtained by fraud.

2 Bule 248

1 Men. 328

2 Bule 248

2 Bule 248

2 Bule 248

2 Bule 248

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2 Bule 248

Real Property

Deeds

Construction of Deeds

Signature
August 1850

The construction of different instruments, depends often so much upon various circumstances that no general rule, can reach all cases of construction in written instruments.

It is a cardinal rule respecting all instruments, that they are to be construed as near the apparent intent of the makers, when admissible by law, as the courts must adhere to the rules of law. But there are some cases in which some technical phraseology is necessary, as the law is in the creation of a fee simple, no other circumstance can create such an estate without that word.

Where the meaning of the language is apparent, and no false grammar will vitiate the deed or affect its construction.

The construction should always be given upon the whole deed, & not on one part alone.

These rules are to be used in determining the intent where there are any uncertainties, & that the construction should be of the whole deed.

The construction should be so made of parts, that more parts of the one same will affect, & which by one construction of one word would defeat another, but by a different construction, both parts would take effect the latter is to be avoided.

When there is any doubt among the

Little J. 235
Placid 100-2
Fl 84
2d 415

Deeds. Real Property

Construction

237-8.
Gr. 416.

meaning of words or clauses, they are to be taken most strongly against him, who uses them.

1000 30
1000 299a
Gr. 418
Hendel. 94.

However two clauses are flatly repugnant so that they can by no possible construction be reconciled, the first is to be retained & the latter rejected. But with the exception, that where a different intent was manifest from either party, the first must be rejected.

1000 22a
188a

And if ^{words or} a clause will bear two constructions

Gr. 414

that are accessible to law & one not so the former is to be preferred, vide, ante

1000 125

Gr. 418

1000 125

And all words that are repugnant to the general tenor of the deed & evident intent of the parties are to be rejected.

1000 85

1000 85

1000 85

When any subject is granted, all means necessary to the enjoyment of are granted with it.

11052a

Upon this principle if a man grants to A all his trees, A has a right to cut the trees & take them away, tho' the land is not conveyed.

1000 85

1000 85

1000 85

So the grantee of a mine has a right to dig & remove the ore.

1000 85

1000 85

1000 85

Hence also the grant of the principal or principal - tho' in a general form, carries with it the incident & appurtenances, tho' no special words be used upon that point.

1000 85

1000 85

1000 85

Thus if one grants a reversion the rent follows it, & passes to the grantee of course with it. The words appurtenances as well as words

Real Property

Construction.

Deeds.

in De
Sh 89, -

In grants of this kind it is seldom left for the parties to supply the meaning of the conveyance as generally it is mentioned.

A very material rule is that a deed drawn in one form in which by law it cannot take effect, may operate as a deed in another form to give effect to the intent of the parties. *ut et magis valeat quam pereat.*

2 Co 35.
1 Inst 201
2 Wils 75.
Sh 81. 2.
Camp 599.
600.
3 Lev 212.

Exgrat. If a deed in form of a grant is made in a remission made to the particular tenant it will operate as a surrender, & not as a grant.

2.

And if a creditor covenants by deed never to sue his debtor, it will operate as a release of the debt, tho in form of covenant, & may be taken as a release.

If the terms of a deed are so uncertain that the intention cannot be discovered it can have no effect at all.

4 Br 225.
Holt 913.

As a deed to one of the children of A who has several. Or to the best man in A.

If one professing two farms says "one of my farms" neither will pass.

A deed is sometimes invalid in part & in whole good. In some cases if void in part, it is so in toto.

In the first place if the deed contains several covenants, some of which are lawful & others not, the former are good & the latter not.

Real Property Deeds.

110 27^b It is said that where one part is made void
 H 70 by statute that there the whole deed is void
 2 Wils 554 but if more parts were made so by the C. L.
 Holt 14 those only would be void.
 { Non ten 199
 200

One would infer from this rule that there is some specific difference between a deed void by stat. & by C. L. but there is none.

The rule is founded upon the phraseology of the stat. merely, which is such as to make the whole deed void for the illegality contained therein which covenant would have alone been void at C. L. But there is no difference between a deed void at C. L. & by stat. if the stat. were differently framed, the effect would be that the instrument would be void in such unlawful parts only.

Holt 6
 H 70

If there are several distinct clauses in a deed, some of which are truly void to the party, & others good, the former are good, the latter not.

The rule that a deed may be void in part & good in the residue, can I think never hold in cases where those parts are so connected as to be dependent on each other. (This I suggest as specimen.)

110 27^b
 2 B. 3. 6.
 H 70
 2 Wils. 25

If two distinct obligations are written on the same paper, one of which is void, & the other not, the former will be void, & the latter not.

If a deed which is read aloud, in part a

Real Property

Injuries

but in part may be paid for the latter, yet if ^{1184.6}
the reading goes for an entire thing as a chance ^{Sh 70.}
of money, it will be good for nothing.

A. Injuries to Real Property

The injuries which may be done to things
which we treat of here are ouster, trespass, nuisance & waste, there are
two others however, of nuisance we shall not treat
at present.

Ouster and the remedies.

Ouster is an injury by which the tenant in ^{possession}
possession of lands, tenements or hereditaments, is
wrongfully removed or turned out of them. ¹⁹⁹

Ouster of a thing corporeal is of two
kinds, deprivation or dispossession, the former denotes
an ouster of the freehold, the latter an ouster of an
estate less than a freehold.

If then a tenant in fee simple or tail or ^{for life} ^{184.109}
for life is turned out he is said to be dispossessed, ¹⁹⁹

but if tenant for years, he is dispossessed.

The ancient remedies for a deprivation are now
almost obsolete one of those was what was called
a real action, which is now useless, for the ^{184.199}
name of these actions is ^{184.199}

The actions of which I am about to treat
are ^{new} ^{actions}

Expulsion is when a lessee for years is
turned from his term recovers it with damages

Real Property

Amici

2. 10. 10

1651 L. n. n. 9

56 11:

2^{do} 77.

The action of ejectment ^{is} ~~the~~ ^{an action} ~~by which~~ ^{in action} a tenant for years, never for the recovery of a freehold.

The action called in the devisor is one in which we assist ^{as} his freehold recovers it with damages from the defensor. This action is proper

for a man a woman

2. A / 1000

100 11

Jan. Dec 250.

Comitatch 68.

speaking a mixed action
in general damages

Formerly, indeed, the plaintiffs in ejectment recovered damages only, but if indeed written by his wife, he could recover his debt, by an action on the covenant. This will account ^{for} the present form of the declaration ~~of~~ in this action, in which the plaintiff claims damages only. The form of the declaration is not altered by the judgment is.

2. 1922-23

This practice of recovering the term was introduced in the reign of Ed. 4. & that since that time the remedy has become specific.

Dec 22, 98

There is some difference between the action of assumpsit in *Case 2^d*, for here the plaintiff must claim the land in the declaration, for their cause must be joined after the practice was introduced, of recovering the term.

A. ~~100~~ 117

1. du 20/10

9 Bl 20

26: .

Is the Plaintiff in error if an action of ejectment recovers a ten year lease only - but is almost the only action for trying the title to real estate. This action in some countries, of a string of legal fictions - which the Plaintiff recovers nominally

Real Property

Ejectment

Duster.

the
3 Bl 200-5.

but a term for years, yet it never to determine the real title.

On which account, the damages recovered in it are usually but nominal.

2 Bac 181.
3 Bl 200-5.

After the action, the rents and profits are recovered by an action of trespass quare damnum super.

In real actions except that of assize no damages are ever recovered. Indeed I hardly know wh. the writ assize should be called a real action since it is for the recovery for damages &c.

2 Bac 155.
181.
68.
2 Bl 157.

83.

On what subjects the action of ejectment will lie

Repleve
August 10th

An action of ejectment will not regularly lie for any thing of which the sheriff cannot give possession without an execution. For without possession given the action must fail.

In other words the action will not lie to recover any thing on which an entry cannot be actually made.

2 Bac 157.
See 64 492
3 Bl 207.

It will not lie therefore in general to recover incorporeal hereditaments, or things which are granted in things of which there can be no actual possession generally speaking.

Buller's 499
See 54
Gr. 9. 1st ed.
2 Bl 789.

Thus if a man is entitled to a term for years he may maintain an action of ejectment, as he may have actual possession of the lands. But if one is entitled to an annuity he

cannot have an action of ejectment to recover it
nor will the action lie for a right of way.

But the action will lie for land laid out in
a high way, in favour of the owner of the land,
for here the action is not for the recovery of
a right of way but for the land itself, of which
there can be corporal possession.

In such cases of the recovery of land laid
out in high way, it is recoverable subject to an
easement.

Li 428
1 Bac 143
2 Bac 54
Str 104
1 Root 118

Suppose the highway to belong to A & B and
as it makes a garden of it, A may recover of
B but cannot hold against the public.

But in *Edm* it has been held that town
proprietors cannot recover a high way by an action
of ejectment, against those who take possession.
I must confess that I do not see the reason
of that decision, & it seems to be ~~very~~ impossible
to discover upon what principle the majority
of the Ct decided the case, & indeed I think it
substitute of all principle & balance.

The right of soil certainly remains where it was
while laid out, & the proprietors certainly had
not parted with it.

Str 420
Exch 152
2 Bac 119

So also this action will lie in favour of the
grantee of the lease of the land tho the soil
belong to another. For while his right of lease
runs his right of possession continues.

Real Property

Ejectment

Writ

But on the other hand it will not be for a water course or stream so narrow, tho it will for so much land covered with water. Since possession can not be given up the water itself.

Reg. 143.
High 104.
2d 15.

It will be for a part or proportion of the space being as a third or half of an enclosure or boundary, & the plaintiff can recover so much as he proves title to.

Who may maintain this action.

The general rule is that no one can maintain this action but who has not the right of entry at the time, that is the right of possession.

And tho the loss of the plaintiff is supposed to have entered, it is merely fiction, and it would not avail him unless he had the right of entry.

3 Pl. 190.
Combrich 33.
3 Pl. 205.
Litt 345.
3 Pl. 179-80.
10 Mod 177.

In an action of ejectment the possession is only used.

The action will lie then only in possession of him who has the right of entry.

If a tenant in tail alienes or fees ad vic, &c. his issue not having the right of entry is not entitled to this action but must resort to a real action.

Since also if the loss of the plaintiff in 10 or more years under whom he claims, have been an adverse possession 20 years, while having the right of possession he cannot bring this action.

2 Mac 100.
174.
3 Pl 206.

Real Property -

And the heir is also barred from bringing the action if his ancestor has been thus negligent.

In Con. 15 years is the time specified.

Both the Eng. & Stat. have our have the usual saving of infants, lunatics, covert persons &c. &c.

In Eng. the deposed owner of the land is ~~in~~ ten years after disability removed to bring his action. In Con. time runs only in ~~all~~ ^{all} ~~the~~ ^{the} ~~case~~ ^{case}. As an infant is allowed ten years after coming to age to bring his action in Eng. & this in Con.

There has been much discussion upon the question, whether successive disabilities can keep the case within the limitations allowed. In Eng. it has been determined that they cannot, but in Con. that they can. In Massachusetts also it has been determined that the successive disabilities cannot be so connected as to keep the case within the saving clause.

If the lat. has once begun to run any supervening disability will not avail to bring the case within the stat.

As for instance if a man is deposed and dies leaving an infant aged one year, the father being under no disability, the stat. began to run upon him, & therefore the action must be brought within 20 years. If it be asked why this distinction is taken, it may be answered that the state provides only for those disabilities that exist at the time the right ^{is} only can

Con. 1535

for the Eng. & Stat.
in
the same way.

5 Con. 53

2 Mass. R. 154

4 R. 300

85

The possession of the land as the plaintiff must have been an actual one within the 20 years, & not a constructive possession i.e. in the right of possession. But 1 P 102
Salk 421.
She 1142.

I doubt whether this rule holds, against a person not having been in for 20 years, if no other has had possession during that time, since there could have been no dispossession, or ouster for the twenty years, for if there has been no possession there could be no ouster or dispossession. The stat. con-
84 tains the ouster of the title by the dispossession of the owner. Besides there is another rule which seems to imply it, viz that where the possession was vacant that no person will be able to defend. But 1291
Exp. Dr 432.

But the rule has not been adapted in law, here a right of possession has been deemed equivalent to an actual possession even in trespass ~~that~~ if no stranger is in possession.

So that there is no need of actual possession as in Exp.

If the owner of lands dispossessed, brings an action of ejectment within the time & is non-suited, that will not prevent the stat. from running against him. 1 Saunders 319
Exp. Dr 432.

And an uninterrupted possession for 20 years in C. 2. 15 in C. 2, is not only a good defence

Section

3 Mac 504.
 504.
 1842. 2. The action of the owner. But goes to maintain
 1842. an action to against third persons
 1842.

There is this diversity between the En rule
 { 1849-50. 20 years, in En possession for the 20 years carries
 190-2 with it only the possessory title, but in En
 1844-5 for 20 years such possession for 15 years confers the absolute
 title.

1840-58.

151. 412

1844

1848.

In En therefore after such dispossession for
 20 years, will not prevent the owner from bring-
 ing a real action for the title. But in En he
 can never bring any action.

It has been determined in En that
 successive transfers in continuity for 15 years
 will bar the owner of his action.

Thus suppose three different persons suc-
 cessively in dispossession each after 5 years each holding
 5 years, now tho the first owner has lost the
 title being ousted for 15 years, can either of these
 three having the possession but for 5 years
 maintain an action for ouster against another.
 I would think that in order to prevent the
 confusion which would otherwise arise that
 the Ct would decide that he could.

The possession which bars the owner
 & gives title must be an adverse possession.

For here is no presumption in London.
 must of the title, & the stat goes upon the
 ground of supposition that if such long

1842.

1840.

1845.

1846.

1848.

1849.

possession of another that the original owner has abandoned his right.

And adverse possession of one of two joint tenants or tenants in common will bar the other.

If therefore one of them wishes to endeavour to hold the whole estate he must prove an ouster, & possession for 20 years. But adverse possession is ouster enough.

And what shall be deemed an adverse possession is a proper question to be left to the jury, & from great length of possession by one of them the jury may presume ouster.

If the party in possession claims under the first act, there is no title required by possession, for the possession to gain a title should be adverse, for otherwise there is no ouster or deprivation, & no implied abandonment of the title by the owner.

And ^{or other} possession by a particular tenant does not bar the remainder man or reversioner. For the person out of possession should have the right of possession during the term, to lose his title.

Where adverse possession is relied upon by a tenant at will there should be strong evidence of an ouster, presumptive evidence however will suffice. For if he holds under another than the owner for 20 years that is good evidence of an ouster.

3 Edw. 2.

But in a general rule that possession of a person under a claim of right independent of the title of the true owner is adverse.

Just per of the stat of Limitations.

If the action is founded upon a clause in the lease giving a right of entry to the grantor for failure of rent, &c, reciting it not necessary to put in the action, he must maintain. It is not an actual entry, but may bring the act in of ejectment. This is accountable for upon the form of the action.

Rich 240.

Long 463.

2 Bosc 142.

1 Ann 213.

2 Bosc 1.

3 Burr 187.

4 Bosc 108.

5 Bosc 108.

6 Bosc 108.

7 Bosc 108.

8 Bosc 108.

9 Bosc 108.

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296 Bosc 108.

Real Property

Trusts

A more equitable title is not sufficient.

La. An.
Feb. 22. 50.

The assignee of the mortgage may also maintain the action as does the assignor.

If however lands leased are afterwards mortgaged, the mortgage cannot eject him, for the legal title of the lease is prior to that of the mortgage. But nevertheless the mortgagee is permitted by the law practice to sue the tenant against the lease, provided he gives him notice that he does so, merely to secure the rent; but the law will never permit him to come in with a title to the possession.

Don. 23. 26.
Exp. 21. 29.

And the mortgagee may recover in ejectment if the money be not paid at the day 2 Day 151.
The debt be eventually paid. This is what is called an outstanding term. 1 Ver. 186.
1 Ver. 186.
2 Ver. 186.
299.

The general rule is then that the party having the legal title may recover in this action. The equitable title be in the defendant, as well as if it were in a stranger. 2 B. & C. 584.
5 B. & C. 122.
12 B. & C. 122.

In some cases however, the law has somewhat relaxed this rule, & in some cases taken notice of the equitable title. The principle of these cases is however highly questionable. There is no need to break down the wall of partition between the law & equity.

It seems a departure from the principle

Devisee.

A devisee of a term for years may also bring this action with the consent of the executor. What then is the remedy if the devisee of the executor will not assent, application must be made to the ecclesiastical Ct, or Ch as may be.

17th Ed. 4-
Lec 7.
Exp. D. 270-
V. D. 188.

In On however I believe that the devisee may bring the action without the assent of the executor, as the legal title vests in him from the testator.

When a freehold is devised the devisee may recover it immediately without the assent of any one, the executor has no interest in a freehold so that his assent is not requisite nor that of the heir as his title is divested by the devise.

P. D.
19th Ed.
19th
Exp. D. 270-
Exp. D. 437.

The assignees of a bankrupt may maintain the action for recovery of lands by him seised at the time of failure, as they by statute are vested with the legal title.

Exp. D. 270
& Day 48

Real Property.

Lecture

August 12th 1868.

§ 61 p. 215.

Acting.

2nd Ed. 180.

The committee of a lunatic cannot maintain the action to recover his land, but the action must be brought in his name; the legal title not being in the committee. And the necessary leave is made by his committee under the order of Ch.

H. C. 180.

In Ch. the owner of a lunatic is called his conservator who is appointed by the Staff of B. & the action of a lunatic must be brought in his own name by the conservator.

L. R. 95. a

2nd Ed. 180.

H. C. 180.

Where a man dies leaving a term for years of which he has been seized, the action must be maintained by his personal representatives.

H. C. 180.

H. C. 180.

H. C. 180.

H. C. 180.

If one is seized of an estate of inheritance and dies, the land belongs to his heir. The heir claims however from the ancestor who was last seized, & cannot through one who never has been seized.

H. C. 180.

It has been determined in Ch. however that the heir may recover lands of which his ancestor was never seized. The reason of this diversity is to be found in the phraseology of our stat, which only requires that the ancestor should own the lands & entitle the heir to the descent, but at the same time was necessary.

H. C. 180.

H. C. 180.

H. C. 180.

H. C. 180.

In Ch. cannot maintain this action for lands, as he cannot hold them, but if he possess a term for years of a house, he can bring the action for an order, he being permitted to

Real Property.

Ejectment.

246

It is sufficient to aver that after the title accrued he made entry. This regularly of pleading may be accounted for because, the action being given to him the entry is not traversable, because the averment is not permitted to plead unless he admits the entry. And no facts need be truly laid but those which are traversable. But this will not account for the practice before the action became a strict action. In Con it is not necessary to aver an entry, as there a constructive possession is equivalent to an actual.

1 S.
Poullet v. 100.
246.

The action must always be laid at some point to the accruing of the plaintiff's title.

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It is said the particular ~~that~~ day of the month need not be laid, & that it is sufficient that it be averred that it took place after the plaintiff's title accrued, & before the suit brought.

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The land or subject ^{conveniently} must be described with sufficient certainty in the declaration, so that the sheriff may know what he is to deliver, & the writ of habere facias.

The Con subject is generally described by a designation of the town or parish in which the land lies, of the boundaries, and a statement of the exact or estimated quantity. The quantity is seldom stated in the declaration.

In Con the boundaries of the land are

very narrow again. The ~~more~~ the width, the greater
of the land & some ^{times} ⁱⁿ ^{the} ^{width}, at almost
every place so could have a proper name.

204
 216 270
 110 50.
 13. 2 20 3. 4
 333.
 Prof. M. D. 104.
 Lath 254.

The pt. is not bound however to state the exact quantity, for tho he declares for more he can recover as much as he proves title to, but he can never recover more than he claims, but he may not.

Cr. Eley 13.
 3 Lev 334.
 1 Bone 320.
 Pump. 200.

That the dept in his action must admit leave & doubt, &c yet he may plead that he was not in possession at the time of the action brought.

1 liter 220.
1 Bul. n 110.
1 G.R. 327.
1 B. 28543.

The d.f.t. is born in fetal the general
space, unless the St. give him leave to enter
a special place.

9 Bl. 2 p. 10

The general space in this section is the

wrong or defective.

2 Prop. 213.
Dini

2 Prop. 214
(Dini)

It has been determined in law that in case of a verbal contract, if there is an action of enforcement between the parties, that will be held not to be law. For, the law is to be that that where the precise point is ~~in issue~~ put in issue with a verbal contract, that verbal is decisive as that precise point, and is not to be any other action and answer. Contrary to that law.

Of the Evidence

2 Prop. 215
2 Prop. 216
4 Prop. 217

There before stands that the defendant recover by the strength of his own title. It is therefore incumbent upon him to prove that he has the legal title.

It is competent then for the plaintiff to prove the title in a third person; but it must be a good & subsisting title in that third person at the time of the action or it will be no defence.

When one claims under a void or voidable lease, the land may be recovered against him in that action.

But it may happen that a plaintiff who has made an invalid lease may destroy his right of recovery by some act affirming his lease.

2 Prop. 218
(Dini)

The rule is that if the lease is strictly void, no act of the lessee can affirm it.

Real Property

Estate

But if the lease be only a lease there may be a confirmation of it & that confirmation implied, & not express. Its acceptance of rent by the lessor after notice of a forfeiture is a confirmation of the lease, or a waiver of the condition.

98 62,
Comm. 500
400.
Exp. 2, 100.

When the plf declares the subject to be several, he must prove them as laid to a common estate, tho he need not prove them precisely as laid.

Exp. 116.
2nd 117.
Exp. 2, 117.

Of the verdict and judgment.

The plf may recover according to the title and he cannot then be declared for more.

Exp. 117.
2, 117.

And the quantity of interest then or length of time the verdict & judgment follows the facts rather than the declaration, tho they cannot be repugnant to it.

Comm. 200.
Exp. 1, 191.

If the plf declares for several subjects and proves title to one, and if then he will recover that one.

And if the declaration should be good in part and ill for the other he may recover the part tho he cannot for the better.

2d 117.
Exp. 2, 117.

If the plf declares for land only he will recover all the buildings & all the appurtenances as they all lay under the general description of lands.

Exp. 191.
2d 117.
Exp. 2, 117.

Real Property.

Dower.

London
August 13th
Balk 2-8
2 Dec 17-9.
10p Di 49th

1 Dec 17-9

September 15th
10p Di 102.

10p Di 100.
10p Di 102.
10p Di 104.
10p Di 106.

10p Di 101.
10p Di 103.

If the *ply* moves, judgment an execution of
where *place* is made to the sheriff to which he delivers
possession to the *ply* & takes away the other party.

If the *ply* has pending the case has taken possession
then he may still recover judgment for damages & costs
but having possession there is no need of a judgment to
that effect, such is the rule in law.

But in law the rule is that the *ply* may
give much satisfaction to the *ply* in case of the *ply*
will maintain it, but at it is necessary to give
the judge to about in law.

If the *ply* has pending the case has taken possession
then he may still recover judgment for damages & costs.

After the *ply* has been for some possession
under the writ, the *ply* has under him again, he
may have a new execution & have the *ply* possession
under the writ, & they may have
an attachment against the *ply* for contempt of court.
But a subsequent action of a mortgage is no contempt.

In the case action by judgment of the court
is for the *ply* the *ply* will require it over again
a new trial, for there is no rule of law, because the
court in the case is not bound to take a second
trial. The *ply* of a mortgage is no contempt
action. This is a mistake to take action of a
new trial for a verdict & judgment in a new case is
a new trial & judgment action. The reason is that

Real Property.

Verdict & Judgment.

Proctor

as the action is continued by petition, a new cause
arises as much as new case & action may be said
as that the former action cannot be identified
with the second, as there is a new answer, leave, &c.

4 Bur 2224
Stu 400.
3 Bur 900.
Bay 204

This is the rule when the judgment is for
the defendant, but it bars neither party.

But if the verdict is for the plaintiff, a new
cause may be obtained as well in this action as
another, for here the effects of a new trial & of a
new action are the same. It was however formerly
held that a new trial could never be had in this
action, but these cases are not law.

4 Bur 2224.
or Bro 274.

Stu 400.
3 Bur 900.
Lo Ha 510.

In the practice of law a new trial
may be maintained by either party on the same
ground as in any other case, for here there is no
action. It is altogether in fact, so that judgment
is a bar in this action as much as others, & that
there is the same reason for granting new trials
as in other actions.

Recovery at the same period.

It seems on the 1st of December 1791
established his title, it follows that the 1st
from the time of the answer has been a trespass &c.

Hence after a judgment in exchequer the 1st
may have an action against the 1st &c. &c.
come damages for his unjust possession. This
action is generally called an action of detinue
for the money property, and the recovery is given.

Stu 400.
or Bay 224.
3 Bur 100.
9 Bur 200.

1 Bac 181.
 2 Wils 121.
 3 Ha 997.
 4 The gains
 5 of the action
 6 are not

1 Bac 181.

1 Bac 181.
 2 Ha 181.

1 Bac 205.
 2 Wils 114.

1 Bac 205.
 2 Bac 181.

1 Bac 181
 2 The note

ally for the value of the loss, unless the act is
 repeated. This action of damages may be said to
 be a general form with a continuandus, from the time
 of entry to the destruction of the property, or the action
 so may be stated which makes it special, the
 former is the most usual form.

This action is incident to a recovery in
 ejectment, for the plaintiff may of course sue in
 ejectment.

It is also incident that the plaintiff may bring
 a bill in Ch for the recovery of the profits, and
 this course is almost out of use.

The necessity of this second action for the
 recovery of the mere profits arises from the
 circumstance, that the damages recovered in e-
 jectment are only nominal, & for the profits any
 action for the intervening profits.

It has indeed been held that the plaintiff
 may recover his whole damages but it is said
 on the other hand that they cannot be recovered
 because the action cannot be laid with a
 continuandus, & if the action cannot be laid with
 a continuandus, they cannot. And in point of fact
 that the action is never laid with a continuandus
 and I do not see why the form might not be
 otherwise.

If the action of ejectment were laid
 with a continuandus, & that the plaintiff might recover
 the whole he could not recover his profits, because

Ben. Lee

Real Property

Mortgage

13 C 1185
10 C 1190

This second action is necessary within the short
of limitation for mortgage, to which 5 years only are
allowed. The Mortgagee the the 1st must have been
in possession of the property and recover for
those 5.

2 Mac 182
1 Mac 185
1 Mac 188
1 Mac 189
1 Mac 191
1 Mac 192

The 2nd action may be brought in the
name of the real or nominal plaintiff. If the
nominal plaintiff is a real person who has released the
mortgage the 1st he would be guilty of a contempt
as defeating the judgment of the 1st.

3 C 118
10 C 119
1 Mac 182
1 Mac 185
1 Mac 188
1 Mac 191
1 Mac 192

If one tenant in common has been added
& recovered in ejectment against his co-partner he
may then have an action of mortgage for the mortgage
proportion the one could not be given the other, be-
cause this second action is necessarily ancillary
to the action of ejectment.

2 Mac 181
10 C 119

1 Mac 182

1 Mac 185

1 Mac 188

1 Mac 189

1 Mac 191

1 Mac 192

1 Mac 193

1 Mac 194

1 Mac 195

1 Mac 196

1 Mac 197

1 Mac 198

1 Mac 199

1 Mac 200

1 Mac 201

1 Mac 202

1 Mac 203

1 Mac 204

1 Mac 205

1 Mac 206

1 Mac 207

1 Mac 208

Finis.



Real Property.

Action of Trespass upon Lands.

This differs but little from that on personal property. The object of this action is to remedy an injury done to a man in possession, which possession must be an actual possession & not a mere right. It is probable however that in some of the states that a right of possession will suffice for this action as it does in case of descent, tho it is otherwise in Eng, in both cases actual possession being necessary. In Con actual possession is not requisite to bring this action, unless there be some opposed adverse possession.

Quia hoc stipitem is but very little adopted in the U S.

This act to constitute a trespass must always be a misfeasance. There is a single instance in the books of a nonfeasance having this effect, but that is considered a singularity. The case is where an officer has a writ & takes the body of the debt and does not return the writ. But trespass will lie. And it is said to be founded on this, viz that he has the writ. But if the officer could come out & show that he had a writ he would be justified. But this cannot be proved. For the existence of the writ can only be proved by the return of it. But he would then be a misfeasance for he is guilty of one

Dealt Properly.

Trespass

This action does not require that the will should concur with the injury that is it is not essential; he would not be liable in some cases be answerable criminally. It would be no excuse to say that he laboured under a mistake. So that from the principle and the will's not being essential a minor is answerable for the action a hater etc. ^{may be some cases in which} But if a man in the pursuit of his lawful action-business commit a trespass he is not answerable for it. But the facts must be taken into consideration. It must not be only in pursuit of lawful business, but there must be an exercise of due caution, and prudence. So if an officer in laying upon the property of J. D. takes that off J. D. it is a trespass. a mere mistake will not excuse him;

p. 37

The only excuse that he was in pursuit of lawful business

Whenever possession is delivered into the hands of another in confidence & that confidence is abused this action will not lie. It is said that were there no fraud it is an exception to that rule that need not be considered an exception, as the fraud destroys the possession & delivery, so that the delivery in confidence is destroyed by the fraud.

Real Property

Trespass.

Where a man commits an abuse upon any thing detained into his possession, an action of trespass vi et armis will not lie, as where a man casts a stone of oven, & the stone greatly abuses them. The owner cannot bring this action.

But if it exceeds the bound of the licence it becomes a trespass. As where a man cuts down a tree having a lease ^{at will only}, it is a trespass because exceeding the limits of the licence. He' there was a confidential delivery. —

inde for
the whole law

8 C. 46ⁿ

5 M. 309.

10 C. 26.

Er 1147.

If a man enters a tavern & abuses his licence by breaking furniture &c he is liable for trespass, but not for neglecting to pay his bill.

Here is a difference between the right of action in the owner, where the property detained is personal & where real. Where a person is in possession of personal property, the general owner is not liable for trespass if he takes it away. This is a settled rule tho' I am ignorant of the reason of it. But in lands it is otherwise, the owner would be liable for trespass.

If a man has a lease for life or years & any one should destroy the houses trees &c, the lease is annulled tho' the owner for the waste, consequently the trespasser is answerable to the lessee. The ground of his right of action is that he is liable for the waste, and has the possession.

Real Property.

Trespass.

But as to personal property the bailee has always a right of action against any one taking it away, or injuring it. He is ^{not} equally liable to the owner as the keeper of lands, if he has exercised ordinary care; how then can he have a right of action, when the owner has also a right of action for the whole damage.

If the bailee first brings the action, the bailee cannot sue for the whole damages tho he may recover his special damages.

There are ^{very} many cases in which the bailee may be liable for all damages; therefore upon that count the bailee is entitled to the action.

But if there cannot be found a case in which the bailee is subject to no liability, there he is not entitled to the action. His liability is the ground of his being entitled to the action.

The breaking of an outer door by an officer in a civil case is a trespass. But if a man taken by an officer escapes & takes shelter in a house he may break open the outer doors.

If the officer has never taken the man he is guilty of trespass by breaking the door but not if he has first served the writ.

Now if an officer after breaking open the door the he ~~leaves~~ leaves upon the property is that a trespass. If it is not he then is bound to carry on the property, but if it is a trespass the law is void. If it be lawful

Exemption

for him to levy in that manner. An officer
may always, by breaking the law, levy upon the
property, but I should think that it ought
not to be allowable for an officer to break
a law unless in cases of extreme necessity.

If the principle is allowed the law forbidding ^{Couper's}
a breakage of the door is almost nugatory. But ^{1st case}
there is a case in Couper, which appears to imply
a charge of abridgment in the 'Ex'. A person hires
a room in a house the outer door of which
was always open, and officer levied an execu-
tion upon him, he contended that the levy was
illegal, because the door to him was an outer
door; the manner in which that case was
argued implies that such a levy after breaking
the outer door was illegal, or else why would
they have gone into the description of the
door? It should be considered an outer door,
otherwise they would have said to the man
sue the officer for a trespass in breaking the
door, but the levy is good, but there describing
the point about the door shows that they
considered that as decisive of the point
whether the levy was legal or illegal.

Real Property

Lecture

August 16.
1872.

This action cannot be brought by any one where possession is not invaded. It is true that in case of detainer and action of trespass may be brought for detainer *vi et armis*, but after the detainer and possession of the detainer, neither the owner nor any other person can bring this action. But I apprehend that generally in the U.S. actual possession is not necessary, unless indeed there be an opposing possession. So that when it is said that this action will not lie except for a detainer where the owner is out of possession, it holds true with us also, as a detainer is an opposing adverse possession.

There is a species of intending possession which will not confer upon the possessor the right of action. As if a man should go without licence & plough up a lot, this is an intending trespass, there being by the supposition no licence of claim or right, and cannot give the intruder a right of action.

Suppose a man to execute authority wrongfully, & the authority points out what he is to do, if he takes another man's property, by mistake the cattle not being described in the authority, he is liable for trespass, but if the cattle were described in the authority he would not be liable for trespass *vi et armis*, if he seized these cattle, the they might not belong to the person against whom the execution was issued.

Trespass.

An involuntary trespass, with as I have observed support this action. The mistake or accident may go in mitigation of damages. But it will not bar the action. Suppose a man executes an authority as an execution, in a manner which the law directs, the officer is not liable in trespass as if, in replevin he takes cattle deputed in the writ, & still they do not belong to the plaintiff in replevin. And trespass is it seems lies against a man for executing a process of law in a manner which the law directs. As if an execution issues as a judgment which is afterwards set aside as a writ of error. This is a voidable judgment, but will justify acts performed under it. So the sheriff is bound to execute process committed to him. So a licence given. The law protects any act done under it, tho' the licence has been afterwards determined.

If men are employed to commit a trespass, they do it without knowing it to be one, they may recover of the person who sent them. Tho' they will be liable for the trespass. If they knew the action to be a trespass they have no remedy over.

But a wife is not liable for a trespass committed at the command of her husband. This depends on the principles of law & equity.

Real Property.

Easement

Calk 254

2 B 25.

1 B 25

L. R. 638

A man may commit trespass not only by himself but by his dogs or cattle & carter. Cattle and morderos paucor must not be set on sowing.

An entry on a man's land is a trespass whatever the damage may be, if it be without permission. But an action could not be supported, where the damage done was merely nominal, for the maxim is de minimis non curat lex.

But for some purposes an entry on a man's land is lawful you may enter a man's house to pay him money without his permission. And I suppose any lawful purpose will justify an entry. There is no question but that you may enter a man's land to kill beasts ferre naturae. But here you must pay all the actual damage. And whenever you have a right of recaption you may enter a man's land to take the property. But you must pay all actual damage. As if you find your horse in a neighbor's field you may enter & take him. But here a owner may resist an entry, where consequential damage is done from it for the maxim is ne ultra vires ut abutem non liceat.

2 B 203.

2 Roll 203.

Perhaps an entry upon a man's land without permission & doing some damage. By the old law the most trifling damage is sufficient.

An entry is lawful where it is made to execute a law process, where it is made for the destruction & removal of waste has been committed. A tenant at will or at sufferance may have this action against a stranger.

Ejectment.

One who maintains it against the owner the other
 tenants may be the owner. If the owner has been ejected, the other
 if he has acquired a right to emblements an injury to
 them will support an action against the owner. His
 tenant is liable in trespass for waste. A person ejected may
 have trespass for this waste. Co Litt 277.

So a person ejected having recovered eject-
 ment may sue in trespass for the same profits. For by
 fiction of law he is supposed to have been in possession
 the whole time. There arises a question of some diffi-
 culty on which the elementary writers differ. Suppose
 a stranger commits a trespass during the dispossession, can
 the owner having recovered in ejectment sue the tres-
 passer? Certainly the dispossessor before the action brought 2 Roll 557
 must have had this action, & had he sued & recovered, it would be 11 C. 51.
 against all the masters of the law to make him liable a
 second time. And beside if the ejector ever had a right of
 possession action. This action is not lost by a subsequent
 action of ejectment, by which he is turned out. And he
 besides the ejector is liable to the owner of the property for
 the whole damage done while he was in possession.
 It seems then that there are fewer principles violated
 by saying that the trespasser is not liable to the real
 owner. I think the case in 11 C. leads to this conclusion
 Howell as he thus understands the case. 11 C. 51.

If there is a dividing fence between owners of
 neighbouring fields the fence must be kept in repair on
 both sides & the other half by the other. If one of the owners

Real Property

Trespass

does not keep his fence in repair & the other does, the former can maintain no action for an entry of cattle from his neighbor's land, and the latter may. If a man keeps part of his fence in repair & part not, & the cattle get over the good fence he may have his action.

As to commensurable beasts, as sheep and neat cattle, they are protected in getting out of the street into a man's land if the fence is not a legal one. But beasts not commensurable are trespassers whatever be the fence or even if there is none, & thus they are allowed to run in the streets by a bye law.

1. If a man does an act on his own land as if he builds a dam on his own land & it injures his neighbor, trespass does not lie but case does.

2. Roll 557. If a man ^{trespass} commits an act which at C.L. was felony, at C.L. no action for the trespass lay. For it would have been of no use, his property went to the king, & his body to the hangman. This was the reason of the rule. The trespass is said to be merged in the felony. But this law does not apply in this country. For the

3. 1. 2. law of Escheite is here unknown. A person having a licence by law & trespassing it as a trespasser ab initio. You may break an outer door to execute a process, where a person has been taken in a civil process & rapes, the outer door may be broken. If the outer door is open the inner door is no protection in any case. If a man have his family & slaves

Camblell's R. by himself, the outer door may be broken, this has been decided in this state. The inner doors of a public house cannot be broken open. The outer door must first be left open. And I should suppose that a room in a private house could not be broken open if occupied by an individual living.

Real Property

Trespass

Another case in which a person may enter another person's lands is where he has the permission, he may enter to see that no waste be committed, but is liable for any injury.

It is admitted that a man may enter another man's wild lands to set for bee hives, and that if a swarm of bees are found they belong in whole or in part to the finder tho' found in another's land. So of a nest of rabbits. In some places there is a custom of giving part of the bees to the owner.

But the finder has no right to cut down a tree to procure a hive for he will be answerable for the damage.

I have already noticed the right to enter another man's lands for the recovery of his property. So also the right of way where one man sells a piece of land surrounded by his own here the purchaser will have a right of entry. But he will not enjoy this right if he obtains the lands any other way than from the owner of the surrounding lands.

If personal property is tendered he must take it, if not he may take real property, if then the officer should take a piece of land thus surrounded by other land belonging to the spt, no right of way will belong to it, for the spt took it from his own choice, and no right of way was implied.

Real Property.

trespass

This action is often brought to try the title so where two men duffer with regard to the title the one out of possession enters a writ of trespass, the not availing, the person in possession then brings an action of trespass, which action is decisive of the title cannot be tried by the Ct who try the trespass, but the law requires a jury from the jury that he will carry it up to a superior Ct if capable of trying the title, & there the right of title will be decided.

These suits for trespass when brought before justices, can be removed to superior Ct to try the title in various ways.

But the decision of the superior Ct here is not conclusive, & may only serve to convince the parties ^{to whom} of the right of title belongs, the another action for the trying the title must be brought.

In most cases in actions of trespass where the title is not tried there are certain limitations as to costs. But if title is plead & the case is tried upon title the whole costs will be awarded.

With respect to damages in this action as in others, great precision is necessary, since a trifling error may be highly injurious.

In this action on the case, it must be questioned that actual possession was had, and a description of the subject; the expression must be borne into your close view & arms.

Trespass

But it will not be necessary to prove an actual force of arms, that is a legal supposition.

It is really questionable whether the words force of arms are necessary, if you state the act made of the trespass, I do not believe it necessary.

The reason why the words against the peace is that formerly it was customary that whenever a man he was convicted of trespass he was fined by the Sh. & in order to entitle the public to the fine a breach of the peace should be alleged, tho' it was nothing to the plf, but that is now done away, & these words are not necessary. It is true there have been some decisions in which the necessity of these words & force of arms &c has been urged, but they probably will not be adhered to.

If the injury is done by cattle the mode of stating it that the defendant entered with his cattle.

In order to prevent persons having no title entering new lands at a great distance, we have an Act authorising a recovery of treble damages for such trespassers.

You cannot recover upon this stat where there was no intention of violation, tho' you may independent of the stat. The damages are recovered in that action as well as the penalty.

And if

Supposing an action to be brought upon the stat, & in the course of the trial it turns out that the deft- acted honestly so as not to be subject to the penalty, would he be liable for the damages which would have accrued at O.L. if it had been determined that he would.

Theoretically
the title

But you cannot bring an action upon the stat after a year has elapsed, so it was at O.L. And if it turn out that if the damage was a year or more before the action brought upon the stat, he will be liable as at O.L.

But suppose the jury go out & in the case are of opinion that the penalty is not incurred, & therefore bring in the damages, 50 dollars for instance, it will be supposed that they meant single damages at O.L. but if they should happen to turn out that they meant to treble it, there will be a ground for a new trial.

By setting fire to brush ^{the wind changing} any ^{any} injury arises which was not contemplated, it is not provided against by the act. The deft is not liable under it.

Under our act I suspect No. of committing a trespass in the night, he may bring him up before a justice, & if he does not acquit himself under oath, the justice finds him guilty. But the Ct. held that there must be some ground

Real Property

Trespass.

of conversion but this is not required under the stat.
And the stat. is not fractured unless yet I do not see
that it is harder than cases always are in Chancery
and those are universally approved

The action of replevin may involve the title of ^{lecture} August 18th 1818
land.

This action is a personal action, the design of
it is to release cattle that are impounded, no
matter whether they are so legally or not.

2 The whose cattle are thus impounded then
has a right to a writ of replevin for the recover-
y of his cattle, for which he must give a bond
rendering him liable to him who has taken
his cattle, if the impounder should recover dan-
age. The cattle then are released and the impounder
who is the defendant comes into Ct and asserts his
right to impound them, which right is to be deter-
mined by the Ct. If the dft recovers he is entitled
to an execution, but cannot take the body of the
person whose cattle he impounded. But if the person
refuses to pay damages, he has his bond by which he
is made answerable for them.

Suppose the man whose cattle were taken
then sets up as his defence that it was no trespass
as the land belonged to him; here then the title of
the land must be tried.

But if the plaintiff should prevail, it becomes

an action of the pap' in et arms against the dpt
for in-favouring.

Finis.

Real Property

Waste.

Lecture 7
August 18, 1872

This is an action given to the reversioner against the tenant, it was not known in some countries, cases at C. L., but now is stat in Eng. it lies against all tenants for life or years. It has become a question in this country, whether the action lies here, it originated from the apprehension that the stts of Eng. are local, many of them undoubtedly are so, but the true line of distinction between the states which should make here & those that should not, appears to me to be that those passed before the ^{emigration} ~~union~~ should operate, but not those since the ~~secession~~ of the states from Eng.

And whenever we give a law of that tenor in which from its nature must be local it can have no effect, but whenever we give a law in Eng. which may be highly for some of the interest of our community and we have no stat upon the subject, then that law is impliedly adopted here as a matter of convenience.

To that the action of waste being of a very ancient nature, we are to adopt it here as it operates in Eng. except in those cases where its operation is merely local & it would be useless or ridiculous in us to give it the same effect in similar cases.

Real Property.

Waste

But when we have established some rules ourselves respecting such actions the case is different.

The action of waste is one given to the owner of the inheritance against him in violation of the estate, either by operation of law as done so or by express contract of the parties as by a lease for years. This definition is not perfect.

This action is then entirely different from that of trespass, for it goes upon the supposition that the trespass is made with.

6 Ben 67,
Old Edition
C L. 54.
5 C 13.

Roll 828

It was formerly law that guardians were liable for the waste of their wards but this is not now law. It did not formerly lie against tenant for life or years, but now it does, but by the stat of Gloucester let him come in by contract or devise. All tenants in short for life or years are liable.

In an action of waste you recover triple damages and the thing wasted. It has been determined that this still extends to all tenants.

Suppose the lease assigns his lease the assignee is liable but that does not discharge the lease, he is still liable. The assignee is liable in consequence of the enjoyment, and the

L 54
16, 683.

Real Property

Waste

The life is consequence of the contract. The ^{Common Law} ^{Med 9} ¹²⁹ ¹³⁰ ¹³¹ ¹³² ¹³³ ¹³⁴ ¹³⁵ ¹³⁶ ¹³⁷ ¹³⁸ ¹³⁹ ¹⁴⁰ ¹⁴¹ ¹⁴² ¹⁴³ ¹⁴⁴ ¹⁴⁵ ¹⁴⁶ ¹⁴⁷ ¹⁴⁸ ¹⁴⁹ ¹⁵⁰ ¹⁵¹ ¹⁵² ¹⁵³ ¹⁵⁴ ¹⁵⁵ ¹⁵⁶ ¹⁵⁷ ¹⁵⁸ ¹⁵⁹ ¹⁶⁰ ¹⁶¹ ¹⁶² ¹⁶³ ¹⁶⁴ ¹⁶⁵ ¹⁶⁶ ¹⁶⁷ ¹⁶⁸ ¹⁶⁹ ¹⁷⁰ ¹⁷¹ ¹⁷² ¹⁷³ ¹⁷⁴ ¹⁷⁵ ¹⁷⁶ ¹⁷⁷ ¹⁷⁸ ¹⁷⁹ ¹⁸⁰ ¹⁸¹ ¹⁸² ¹⁸³ ¹⁸⁴ ¹⁸⁵ ¹⁸⁶ ¹⁸⁷ ¹⁸⁸ ¹⁸⁹ ¹⁹⁰ ¹⁹¹ ¹⁹² ¹⁹³ ¹⁹⁴ ¹⁹⁵ ¹⁹⁶ ¹⁹⁷ ¹⁹⁸ ¹⁹⁹ ²⁰⁰ ²⁰¹ ²⁰² ²⁰³ ²⁰⁴ ²⁰⁵ ²⁰⁶ ²⁰⁷ ²⁰⁸ ²⁰⁹ ²¹⁰ ²¹¹ ²¹² ²¹³ ²¹⁴ ²¹⁵ ²¹⁶ ²¹⁷ ²¹⁸ ²¹⁹ ²²⁰ ²²¹ ²²² ²²³ ²²⁴ ²²⁵ ²²⁶ ²²⁷ ²²⁸ ²²⁹ ²³⁰ ²³¹ ²³² ²³³ ²³⁴ ²³⁵ ²³⁶ ²³⁷ ²³⁸ ²³⁹ ²⁴⁰ ²⁴¹ ²⁴² ²⁴³ ²⁴⁴ ²⁴⁵ ²⁴⁶ ²⁴⁷ ²⁴⁸ ²⁴⁹ ²⁵⁰ ²⁵¹ ²⁵² ²⁵³ ²⁵⁴ ²⁵⁵ ²⁵⁶ ²⁵⁷ ²⁵⁸ ²⁵⁹ ²⁶⁰ ²⁶¹ ²⁶² ²⁶³ ²⁶⁴ ²⁶⁵ ²⁶⁶ ²⁶⁷ ²⁶⁸ ²⁶⁹ ²⁷⁰ ²⁷¹ ²⁷² ²⁷³ ²⁷⁴ ²⁷⁵ ²⁷⁶ ²⁷⁷ ²⁷⁸ ²⁷⁹ ²⁸⁰ ²⁸¹ ²⁸² ²⁸³ ²⁸⁴ ²⁸⁵ ²⁸⁶ ²⁸⁷ ²⁸⁸ ²⁸⁹ ²⁹⁰ ²⁹¹ ²⁹² ²⁹³ ²⁹⁴ ²⁹⁵ ²⁹⁶ ²⁹⁷ ²⁹⁸ ²⁹⁹ ³⁰⁰ ³⁰¹ ³⁰² ³⁰³ ³⁰⁴ ³⁰⁵ ³⁰⁶ ³⁰⁷ ³⁰⁸ ³⁰⁹ ³¹⁰ ³¹¹ ³¹² ³¹³ ³¹⁴ ³¹⁵ ³¹⁶ ³¹⁷ ³¹⁸ ³¹⁹ ³²⁰ ³²¹ ³²² ³²³ ³²⁴ ³²⁵ ³²⁶ ³²⁷ ³²⁸ ³²⁹ ³³⁰ ³³¹ ³³² ³³³ ³³⁴ ³³⁵ ³³⁶ ³³⁷ ³³⁸ ³³⁹ ³⁴⁰ ³⁴¹ ³⁴² ³⁴³ ³⁴⁴ ³⁴⁵ ³⁴⁶ ³⁴⁷ ³⁴⁸ ³⁴⁹ ³⁵⁰ ³⁵¹ ³⁵² ³⁵³ ³⁵⁴ ³⁵⁵ ³⁵⁶ ³⁵⁷ ³⁵⁸ ³⁵⁹ ³⁶⁰ ³⁶¹ ³⁶² ³⁶³ ³⁶⁴ ³⁶⁵ ³⁶⁶ ³⁶⁷ ³⁶⁸ ³⁶⁹ ³⁷⁰ ³⁷¹ 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Real Property.

Waste.

It is a tort & no man's executor is liable for
 his tort. If the man's personal estate for had been
 2 Call 827 involved by the waste it might alter the case
 1 Com 890. & render the executor liable, on the score of the
 assets being besieged the action may be so
 framed as to recover out of them, but not ground-
 ed on the tort.

If the husband & wife commit waste,
 or if the wife has the lease, & the husband
 commits waste he is liable, but it is said
 that if the wife dies no action will lie
 but this is against authority, and probably
 should be that if the wife commits the waste
 that after her death no action will lie
 against the husband, for he is only liable for
 the conduct of his wife during cohabitation.

Against tenant in tail after possi-
 bility of issue extinct, the action of waste
 will not lie. But he is not considered as having
 a right to the subject of waste as an action
 will lie against him for the value of such
 subject.

Neither will the action lie against
 tenant at will, for the moment he commences
 to commit waste his estate is determined.
 The first stroke that he makes with a tree down
 uses his estate & the second is therefore consid-
 ered a trespass.

1 Com 891
 2 Com 892

Real Property

Waste

It is certain that the action of waste will not lie against the mortgagor or his assigns. In case of lease the mortgagor has no estate, & the mortgagee can enter and evict him whenever he pleases, and as he has no estate at law, no action at law can be brought against him.

The mortgagor cannot bring this action at law against the mortgagee he having no title he cannot have an action against him at law, but the Ct of Ch will grant an injunction to stop waste. G.L. 54.

If the mortgage is redeemed all the profits to be accounted for.

34.

But if the mortgaged premises are not of equal value with the debt the Ct of Ch will not grant such injunction. 2 Roll 82.

If the waste is in any manner occasioned

By the tenant will not be liable.

Whenever it is the fault of the person with whom you contract, that the conditions of the contract are violated or not performed you are not liable. G.L. 53. 10 B 139.

No person can bring this action except the remainder man in fee or in tail or immediate remainder man can bring the action.

But an intermediate remainder will prevent the remainder man of the inheritance from suing. G.L. 54. 2 Roll 829.
 as action can be brought at law for this case. But Ch will grant an injunction to stay waste for either party. Moor 18. En 888.

Real Property.

Waste.

Lecture

August 19th

p. 670.

It is a rule that the heirs cannot sue for the inheritance at the time of the waste committed. The heir therefore cannot bring an action for waste committed in the life of the ancestor.

I suppose the reason for this rule is that the rule was once that no person could bring an action as executor, but that has long since ceased, a statute being passed giving this action to an executor by the statute of that stat the heir should be entitled to the action, the reason of the stat tho the latter of it will not apply to the heir.

The heir may sue for a trespass committed in the life of the ancestor under the stat.

Waste may be committed in houses, in gardens, lands &c.

To know what will be waste in houses depends upon what is the duty of the lessee. That generally depends upon the contract, but whose duty is it to keep it in repair if no contract be made on that subject, at the C.L. the lessee is bound to keep it in repair, but we are accustomed to have the lord do it. But our practice is contrary to the C.L.

What then is waste. He cannot keep it in repair or it is waste, it is the rule that he must keep it so that he leave it as good as when he took it. But this is strictly impossible on account of the natural decay.

Real Property

Waste.

The rule is that if he took the house tight and dry he must leave it so. As if the cements were whole when he entered he must leave them so.

But it need hardly be mentioned that the destruction of any out house or for convenience is waste.

If any destruction happens by a tempest or any act of Dei, he is not answerable for the waste tho' he may be for not repairing or may not be. If part of the roof of the house is taken off so that if not replaced the house will be ruined, he must repair the roof. There are many strange & nice cases on the subject of waste.

6 L. 30
2 Roll 314
4 C. 69
Moore K. 2
2 Roll 318.

Suppose the lessee pulls down a house & builds a larger & better one this will be waste the principle of it it seems to be that the lessee must not change the substance of the property. But I do not think that would be considered as law at this time.

2 Roll 315
6 L. 30
Roll 224
2 Roll 413.
1 Lev 309.
1 Mod 94.

If it was wrong to do it without licence it was damnum absque injuria.

There has been a great revolution of opinion respecting waste, in those cases where the tenant removes certain articles which he had affixed to the estate for his business so the old rule was that nothing fixed could be removed.

Heat Register.

Mail.

But it is absolutely necessary for health.

Table 308 some articles should be fixed to the estate, but
such a fixing is not now considered as making
them real property or destroying the tenant's
right to them unless they cannot be removed
without

more R. 69
2 hole 810.
6 L 53

Waste in lands. Where there are banks or walls to keep out water from lands, it is the duty of the tenant to keep them in order and the drains so unless there be a contract to the contrary.

2612
Nov 1905
6450
Rose 101.
2 Roll 850

Has he the ^{same} ~~same~~ ^{same} right to dig for mines?
if there were any open at the time, he has
a right to dig; if there were none open he
has no right to dig.

I do not think that it would be
considered waste here now.

18
 EL 59
 2 Lesnor 174.

So likewise any change of the land
 as arable land into meadows, altho beneficial
 the estate, will be waste

2 Roll 812
2 R 825

I very much question whether this principle would be adopted in our Cts.

But if land is sometimes used for two different purposes it may be used for either.

Setting up new fences or digging ditches,
to increase the land is not waste.

52

It is not waste to do, for more, if
the terms of the demand give the liberty the
the more.

Waste.

If a man is negligent about his farm by permitting trees to grow this is not waste.

Of waste in timber.

By the 4th no tenant has a right to any timber but what is necessary for repairs. This law is strictly necessary in Eng. but will not be so rigid in our country.

The tenant has a right to fire-hots & plant-hots which is necessary to make fences. But they have no right to take timber wood. ^{More} if other can be had. But these rules will not prevail here there being no kind of utility here.

75.

What are timber trees is very nicely determined in Eng. But in our country it is highly useful to cut down the trees.

But the tenant has no right to cut down any trees which are set up for ornament or shade.

In one case in Eng. a tenant sold the trees and applied the profits to repairs, it was deemed waste, tho it was less expensive than to have applied the trees themselves.

S. H.
2 Roll 822-3
2 Roll 225-
2 Roll 814

With regard to gardens cutting down fruit trees &c is waste.

2 Roll 814.

If a certain house or wagon is erected on the tenant is not considered as in trespass or not waste. so that it will be trespass or not waste.

Or Eng 290

Waste Property.

Waste

8454-5
 Nov 182
 2 Eliz 690
 C 81

There has been a question what is recovered where the waste is paying or is now settled that the whole land shall be recovered.

When the injury is occasioned by the act of God, the tenant must repair if it can be easily done but he is not liable here for waste.

The cases where he may be excused from repairing it may be difficult to determine.

Ch of Ch often interfere in case of waste, on the apparent necessity that injustice should be prevented that could not be under the better rules of law. Wherever it is possible in any demise that a person shall have an estate for life without impeachment of waste, the Ch of Law cannot here interfere but Ch of Ch have in some cases interfered to stay waste, not in ordinary cases but only in those in which the waste was malicious not for ordinary waste. They have interfered in those cases only where they concluded that it could not have been the intention that such waste should have been committed.

There was a case in which an estate was devised to a father for life remainder to the son in fee, there was a very elegant & solid house now of great value. The father was born the father being angry with his son and the house was the father's subject to sell the

Waste

But he never would have cut them if he did not wish to improve his son, it was his son's waste, but if those trees had been growing in different parts of the land, the son would not have been so held.

2 Cur 438
1 P. 110 528
1 Ves 225
2 Atk 217
2 Br 104 87
1 Des 521
3 Br 104 529
5 529

Cutting down trees and so more which also would be considered waste.

But of Ch in all such cases, will grant an injunction to stop waste.

2 Atk 217
2 Br 104 87
1 Des 521
3 Br 104 529
5 529

If such a tenant destroy a house they waste, cannot him be relieved, & lay down under a statute for destruction of timber, which is always laid with the utmost precision.

Chancery has granted an injunction to stop waste in case of a lease without impeachment of waste in case of the waste was not intended to be permitted.

Another case where Ch will interfere is where the legal owner is trustee for some one else. But Ch of law will protect equitable rights also.

Another is where a possessor's rule interferes as on an estate for life remainder for life remainder in fee but law the remainder man in fee has no remedy, therefore Ch will interfere to prevent waste. Ch will also interfere to prevent waste of the property of an unborn child.

Where a man had a lease of without impeachment of waste and endowment

Real Property

Nuisance.

(Litch 196)

If the mortgagee in possession commits waste the mortgagee does not wish to take possession. he may file a bill in Ch to stop the waste.

(Litch 181)

May the mortgagee commit waste, if the lands be a sufficient security, he has no right to commit waste; tho he must account for it, but if he does when he has a right to which is where it is not sufficient security.

Nuisance

No complete definition of a nuisance can be given. I shall speak of it only in it's relation to real property. It is defined to be any thing done to ^{or injury} ~~any~~ the lands, tenements &c of an person.

If a person has received an injury from a public nuisance he may bring his action for his private damages.

A nuisance is never a direct attack on private property, for that would be a trespass or an armis, but it must be in it's nature consequential.

If one man builds his house so overhanging that of another it is called a nuisance but I should think that the act itself is a trespass or an armis tho' the effect may be a nuisance. as the gutter of water on the other man's house.

Nuisance.

Obstruction of ancient lights is also a nuisance, tho it may be difficult to determine what are ancient lights.

Lo Mansfield supposed that were a building ^{had been} erected 20 years that the lights might be considered ancient. Be Chy 113
Salk 454

A third species of nuisance is the setting up an offensive trade where there is no necessity for it. But here there must be a priority on the part of the person complaining as to the building of his house.

96. There was a question whether a man could build a stable so near a house, as that the noise of the horses prevented sleep; it will depend upon the state of the place, and the necessity of the thing, whether such a building would be a nuisance. 9 Bos
Salk 459
Be Ch 500.
Be Chy 118.
505.

A stable was erected and the noise of the horses irritated the neighbours, the Judge held that if the person building had no other place to put it, that it could not be removed as a nuisance. For men must be permitted to carry on their business.

It has been a question whether the obstruction of a fine prospect is a nuisance, but it is now settled that it is not.

The principle is sic ut non laedas alium

Nuisance.

Nuisance to Lands.

Moll 89

No one has a right to raise dams to over-
flow the lands of another, this must also
depend greatly upon priority. For if a man
settled in a new town to carry on his trade
erects dams &c which overflow neighbouring
lands which are not occupied nor owned, it
is no nuisance. But if the overflowed land
which will probably be occupied by the
owner it will be a nuisance.

If a man ~~also~~ has a stream of water
running through another man's land, ^{of his own} no
one has a right to turn the course of
that stream. For a man has a right to a
stream of running water through his land. But if
the stream had been diverted before any title
was had in the land, no complaint can
be made in law that the water would
have run through the land if it had not
been diverted.

Common law - a
the right of the
the riparian owner
to the water
is not a right
in the water
itself.

No one can divert such a stream so as to
draw it off. But you may divert part of
the water if you please through all seasons
to the man below. He pursues for which he gives
Bond it cannot be interrupted. This depends on prior occupancy.

Streams of water that persons have
a right for the watering of cattle &c if
any person sets up a trade which pollutes
the water so that the cattle could not
drink it it is a nuisance but if

Real Property

Insurance.

he had set it up while the lands were wild & unoccupied. It would be different.

So that the principle of first occupancy has great influence in these actions, which are very numerous.

If water enough is left to answer his right purpose, no matter how he disposes of the rest that runs through his lands.

The ownership of the spring is of no consequence, prior occupancy of the stream is the great point. No one must interrupt it unless so libat currere if it was made use of by any one in its course.

The general rule in all cases that every man has a right to pursue his own trade, & therefore tho another man sets up a similar trade & thus injures others it is damnum absque injuria. But there are some cases in which a person has acquired a right to the particular trade or employment by grant, or by prescription. If one man has long had the ferryage of a certain place, in which he has been long subject to the controul of the legislature, he cannot be interrupted in this trade.

Where the legislature have a right to controul & grant a certain trade, it cannot be interrupted by the setting up of the same trade near it.

Easement.

There are cases in which a right to have all the custom of a town or village to a particular mill exists arising from the supposition that the mill was erected for the convenience of the town, and on condition that they should support it. Where lands are given to a man for the purpose of erecting a mill I should think that no one else can interfere.

A man may purchase a right of way over his neighbor's land, which is an incorporeal hereditament, & it goes with his land to his heir or devisee, &c. It may be implied right, in which case he is to pass in the most convenient place where the least injury shall be done.

There is also a right of fishery, this in navigable waters and in others depends upon custom, but in navigable streams no one has a right to fish taken on the land of the proprietor of the banks, tho' all may have a right of fishery in the river, and may go in boats &c. to fish. But it is not unusual to acquire this right of fishery on another's lands. No one has a right to exercise the privilege of fishery to the prejudice of public convenience.

If a man owns lands that are half the time covered with water, and at other times not, and this land as such shall be

side
next page
p. 34

Real Property

294

It is settled that men are born a right to go
and dig there shall look

Rent. If it is reserved in the lease
it is an incorporeal hereditament & is payable un-
usually. And the rent goes to the lessor or his
heirs. If a sum in gold were received, it
would be personal property & so to the executor.

An annuity is real property. But an estate
tail cannot be created in it. It has some other
very other. For the annuity is charged on the
reversion.

It is a settled point that you may dig
between logs - low water mark and a man's
land.

The first part of the book is devoted to a general
 description of the country, its climate, and its
 resources. The author then proceeds to a detailed
 account of the various tribes and nations which
 inhabit the region. He describes their customs,
 manners, and mode of life, and gives a list of
 the principal towns and cities. The second part
 of the book contains a history of the country
 from the earliest times to the present. The
 author traces the progress of civilization, and
 the growth of the various nations. He also
 describes the various wars and conflicts which
 have taken place, and the changes which have
 taken place in the government and constitution
 of the country. The third part of the book
 contains a description of the various natural
 curiosities and wonders of the country. The
 author describes the various mountains, rivers,
 lakes, and forests, and gives a list of the
 principal animals and plants. The fourth part
 of the book contains a description of the
 various arts and manufactures of the country.
 The author describes the various methods of
 agriculture, and the various arts and crafts
 which are practiced. He also gives a list of
 the principal minerals and metals. The fifth
 part of the book contains a description of the
 various religious and philosophical systems
 which are practiced in the country. The
 author describes the various religions, and the
 various philosophical systems, and gives a
 list of the principal teachers and philosophers.
 The sixth part of the book contains a
 description of the various literary and
 scientific works which have been produced in
 the country. The author describes the various
 books, and the various scientific works, and
 gives a list of the principal authors and
 scientists. The seventh part of the book
 contains a description of the various
 historical events which have taken place in
 the country. The author describes the various
 wars, and the various historical events, and
 gives a list of the principal events. The
 eighth part of the book contains a
 description of the various political and
 social systems which are practiced in the
 country. The author describes the various
 governments, and the various social systems,
 and gives a list of the principal systems. The
 ninth part of the book contains a
 description of the various economic systems
 which are practiced in the country. The
 author describes the various economic systems,
 and gives a list of the principal systems. The
 tenth part of the book contains a
 description of the various cultural systems
 which are practiced in the country. The
 author describes the various cultural systems,
 and gives a list of the principal systems.



7

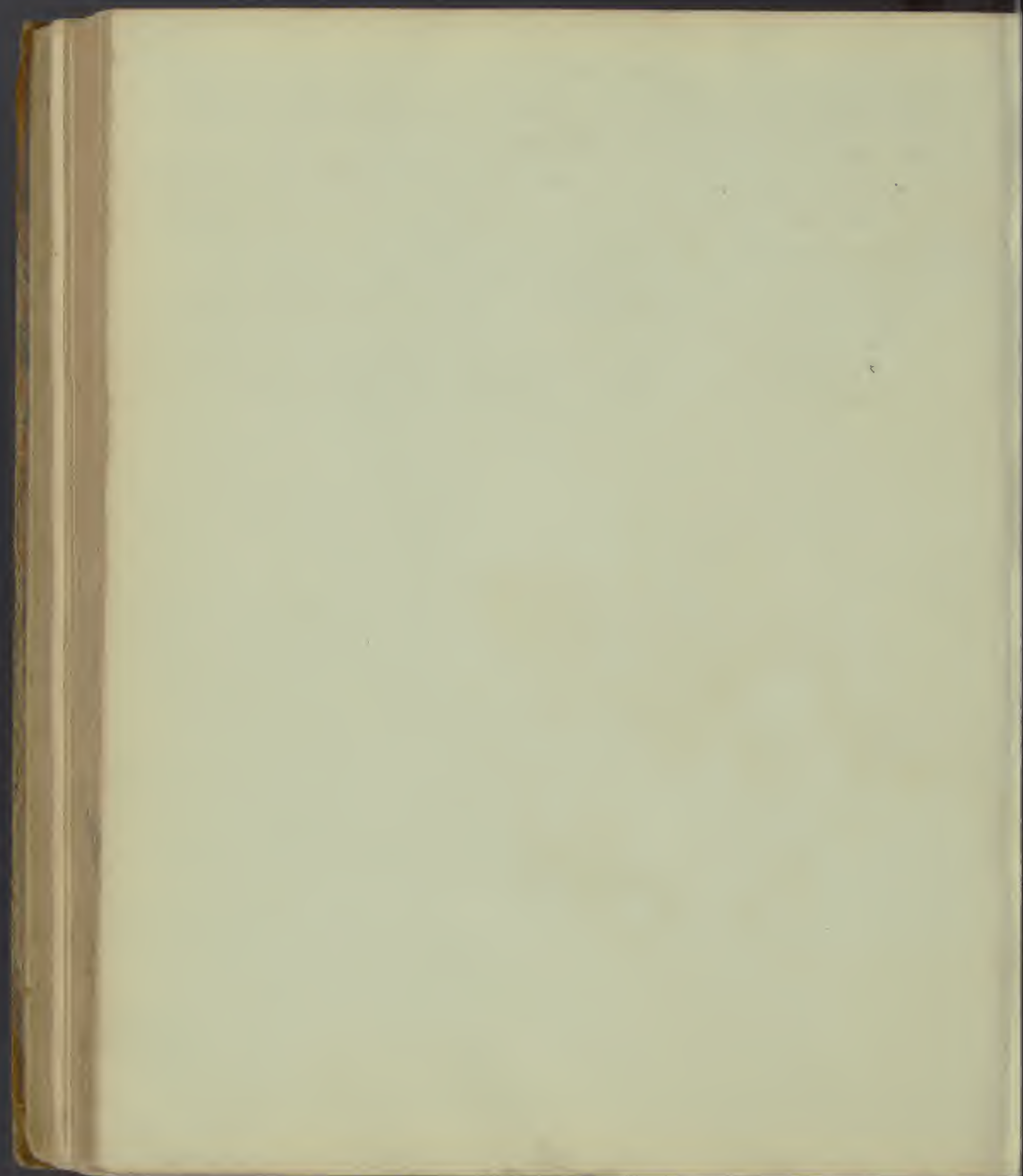
Appendix.

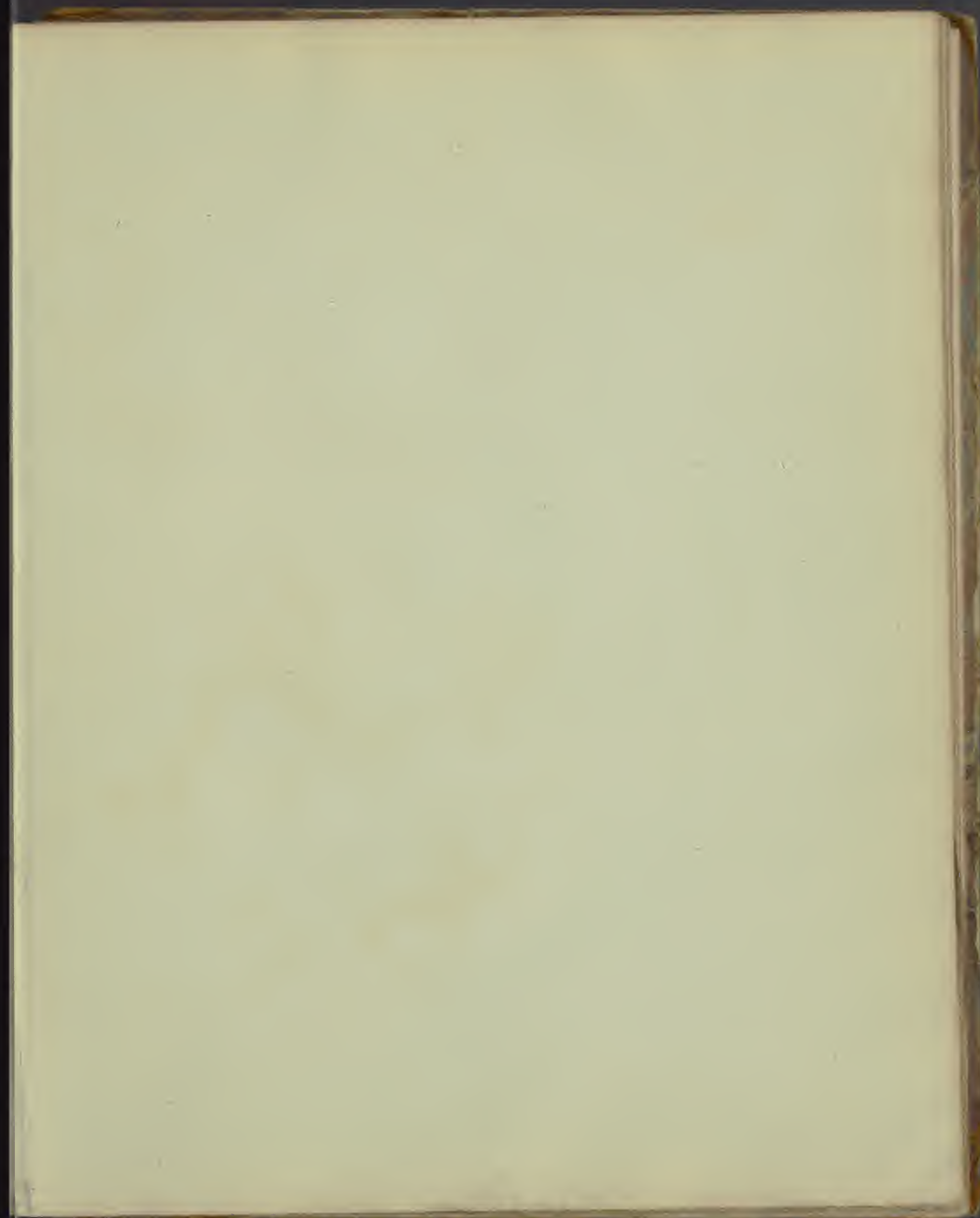
In Mass an estate tail may be conveyed to another in fee by deed duly executed, &c. —

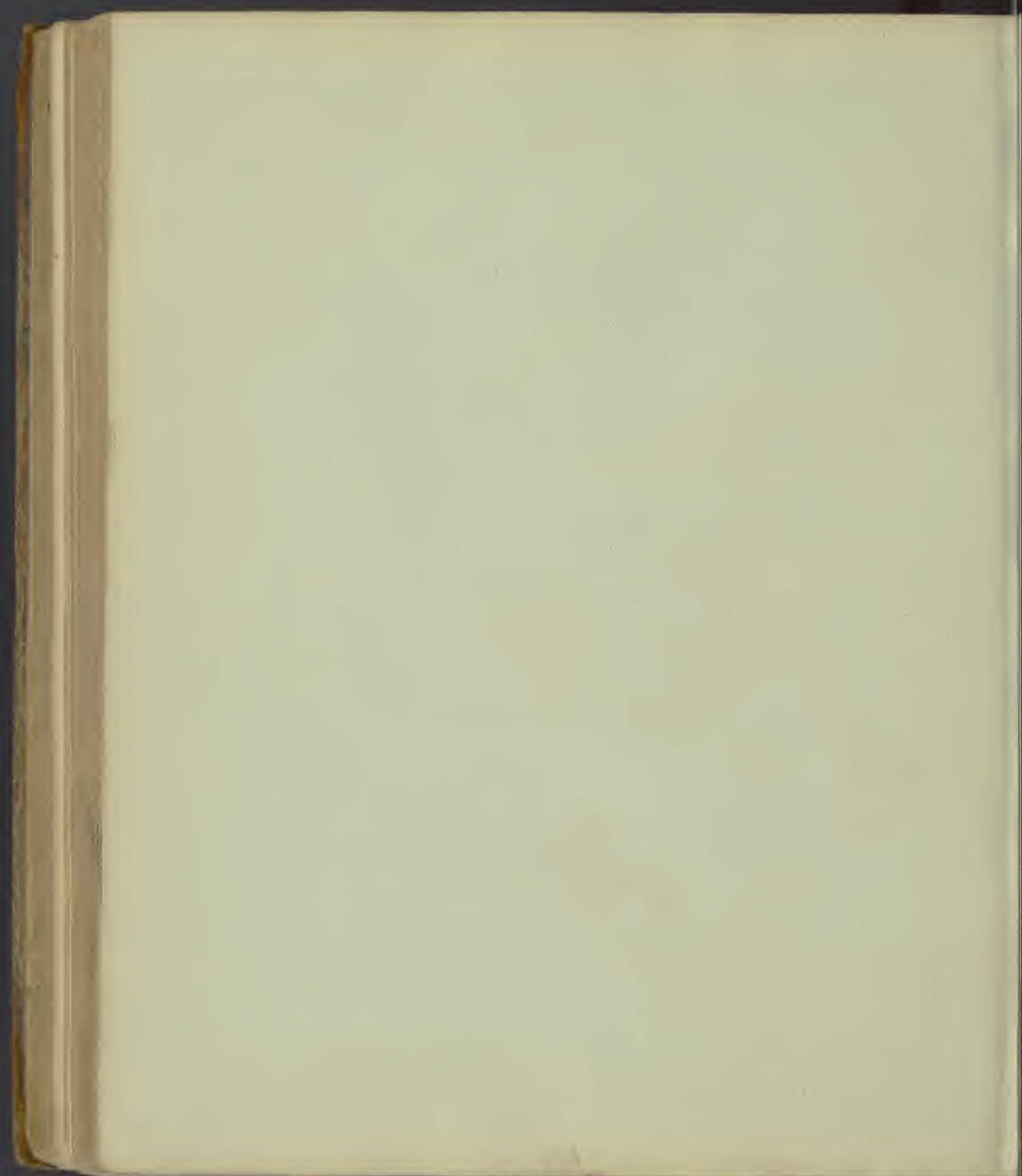
And a devise to one for life and after his death to his heirs be a common life fee, gives such devise only an estate for life & the children &c. as per also — see the Laws of Mass. vol 2 — 542. —

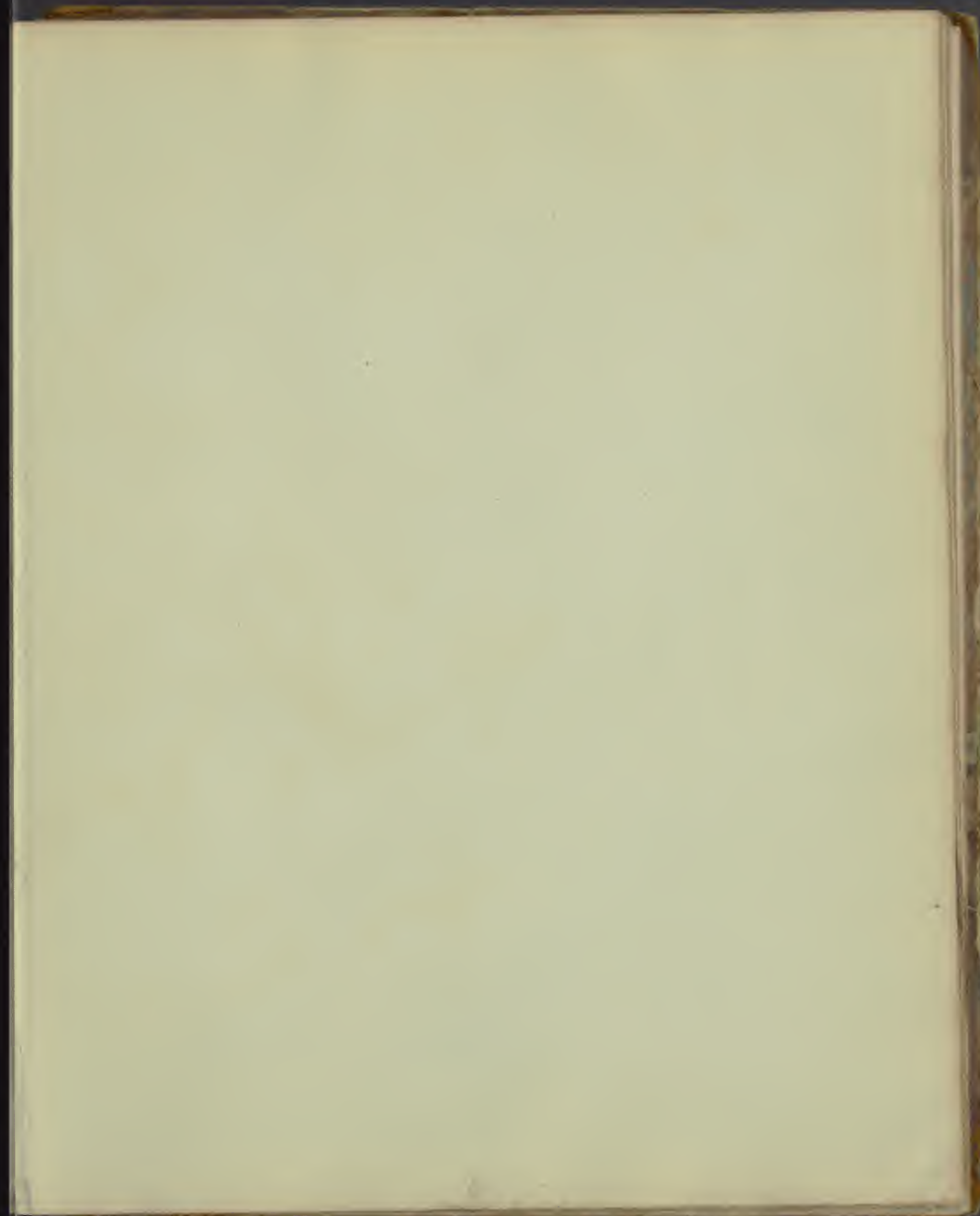
The doctrine of taking in consideration, not known to the Mass. Law. —

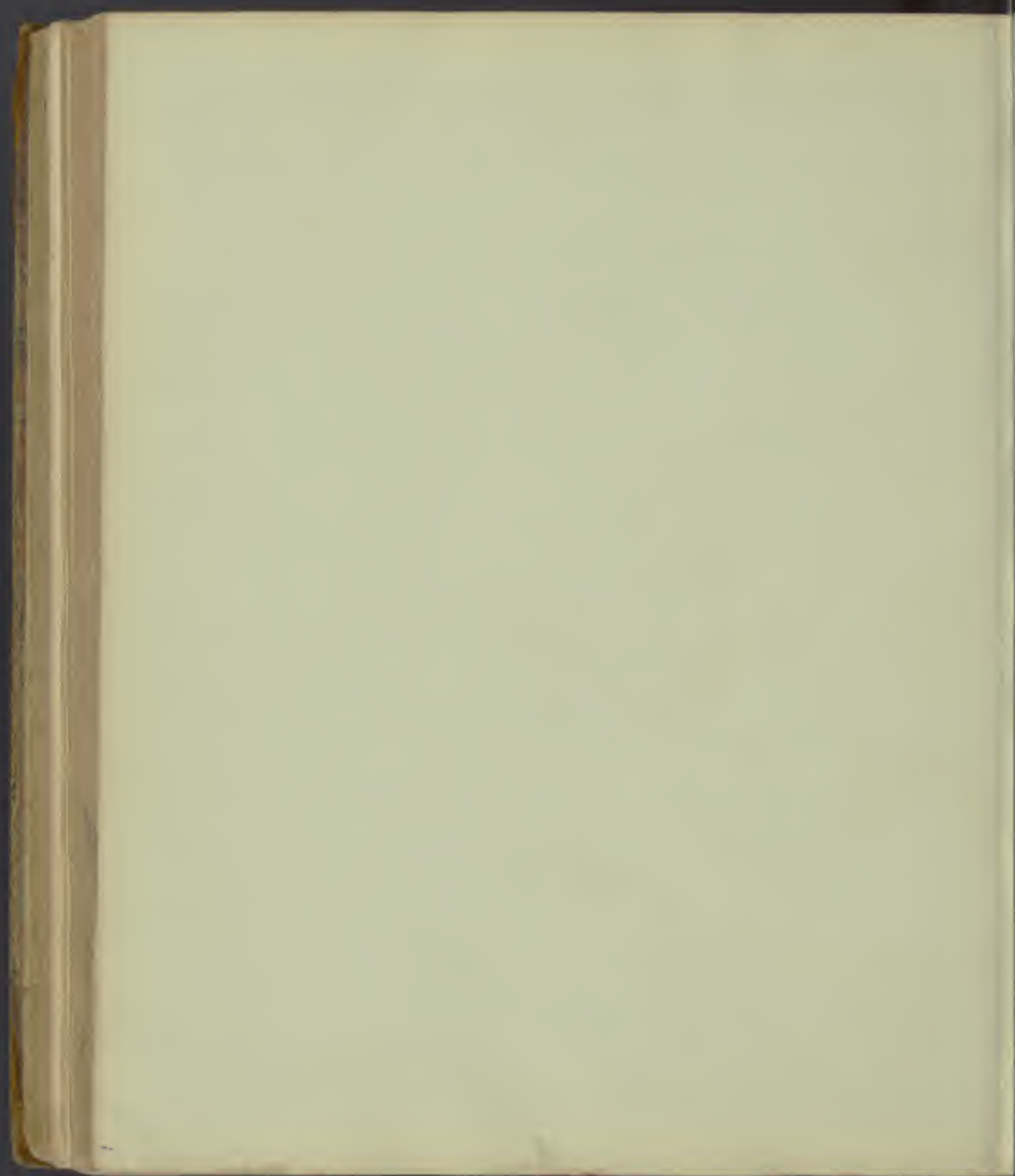
A joint tenant may devise his interest — in Mass. — In Mass. the levy of an execution carries a title. —

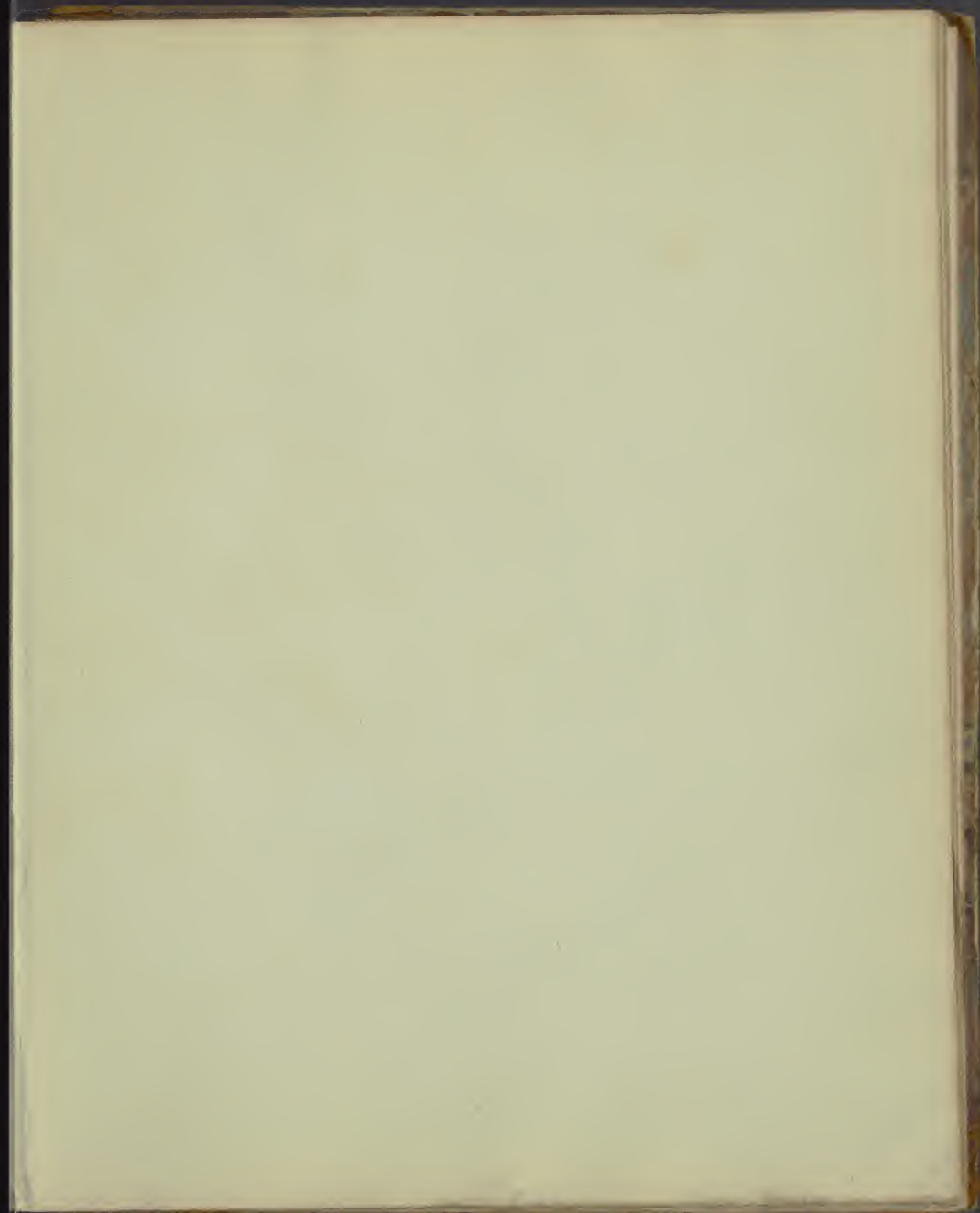


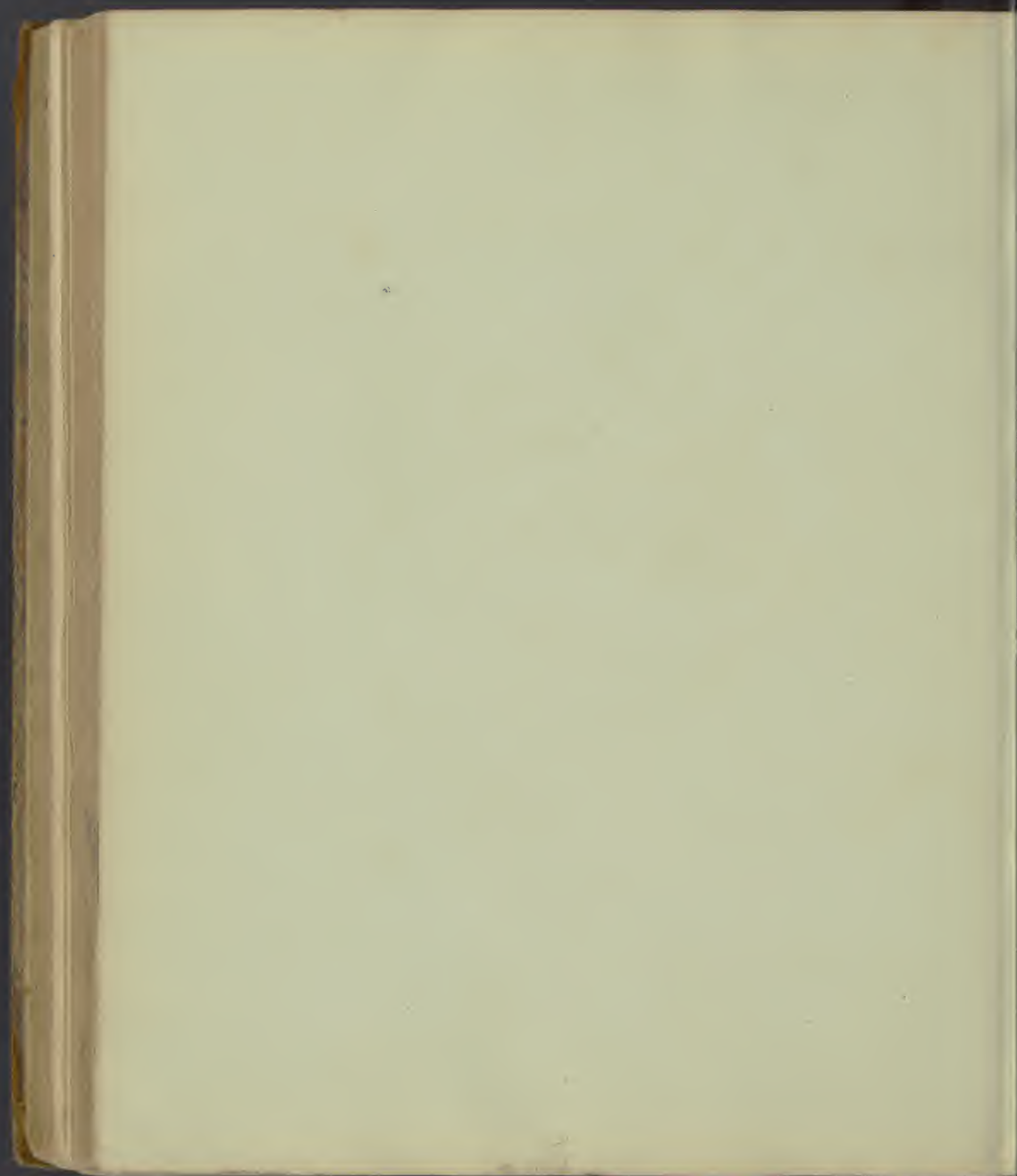


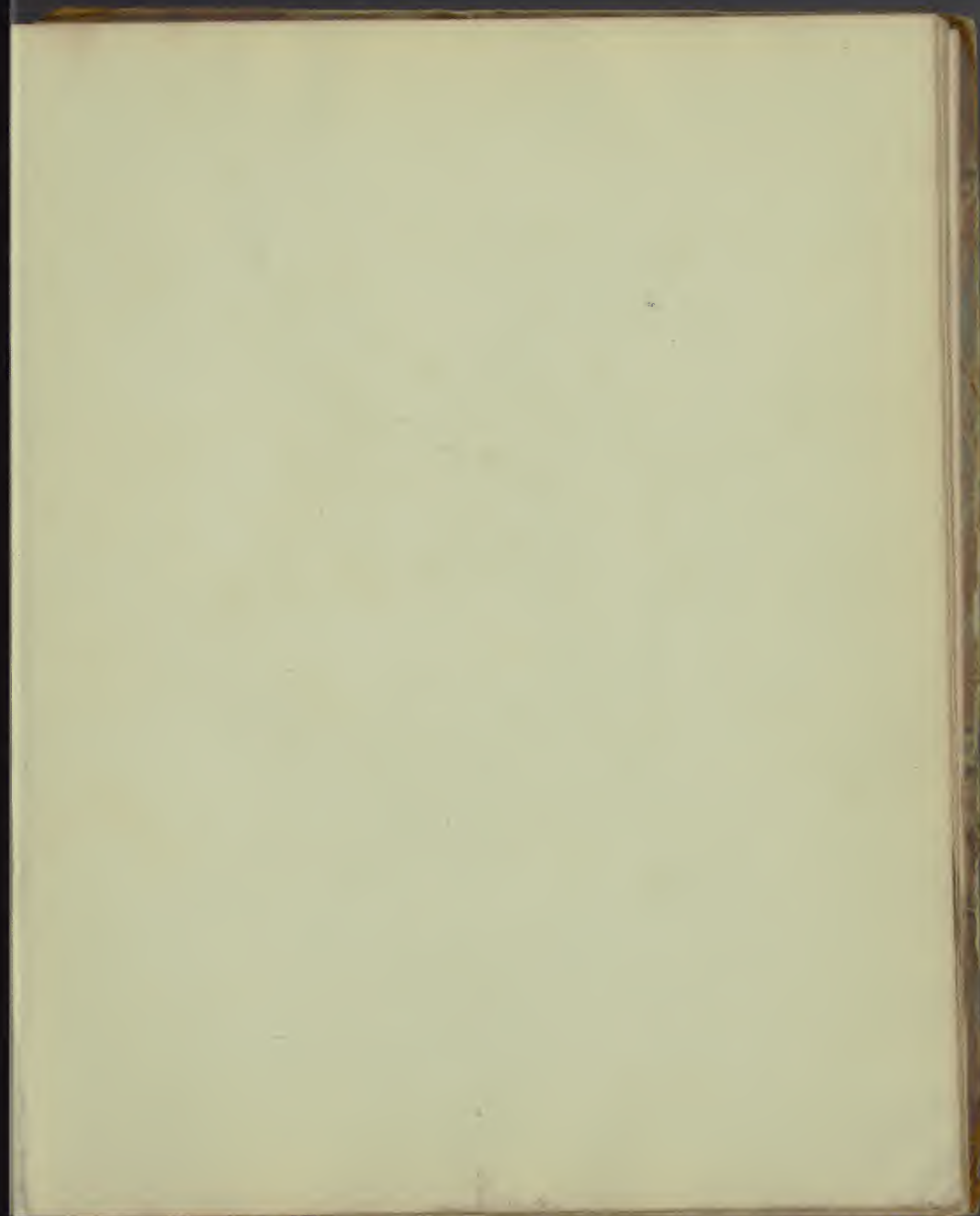


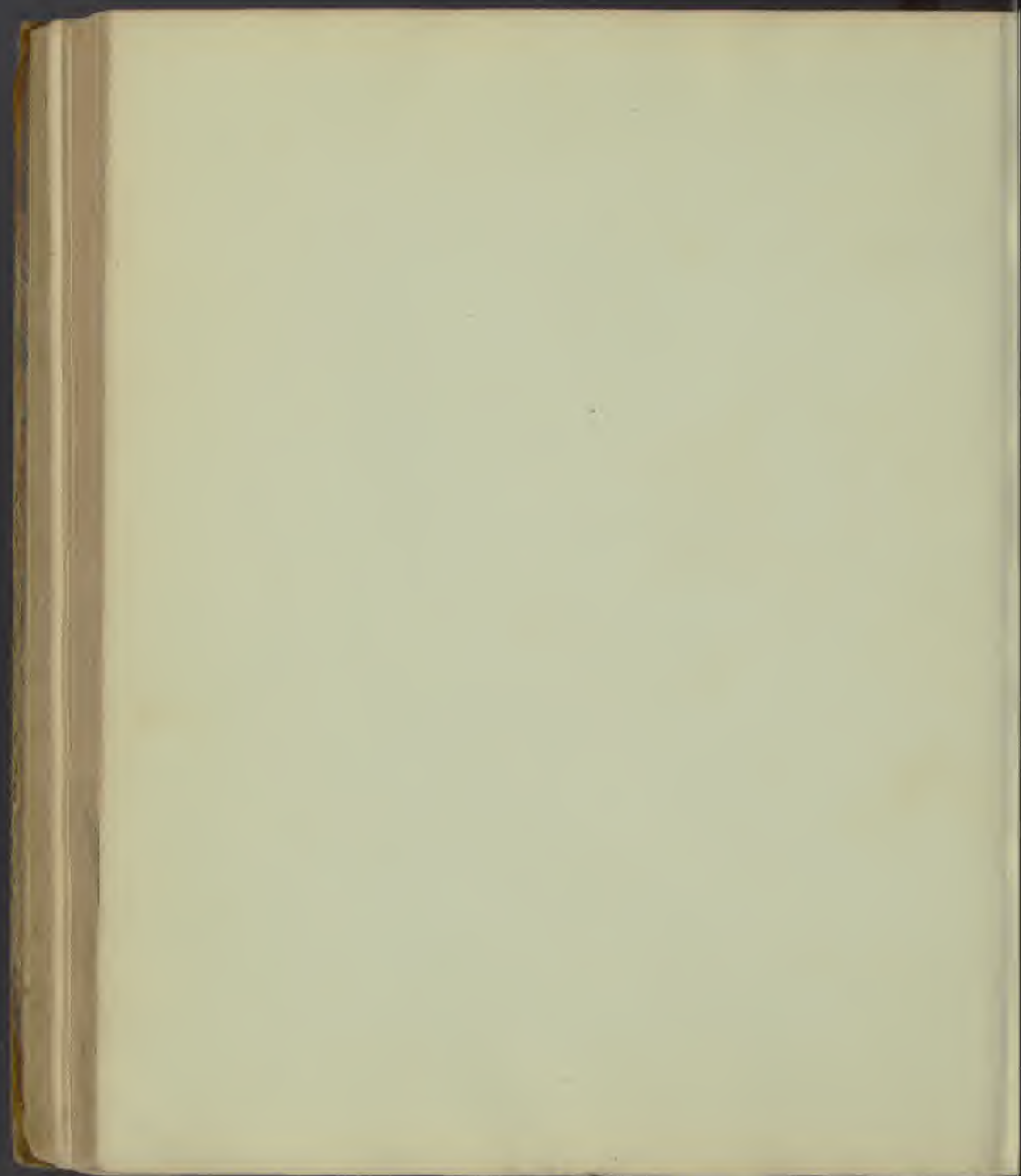


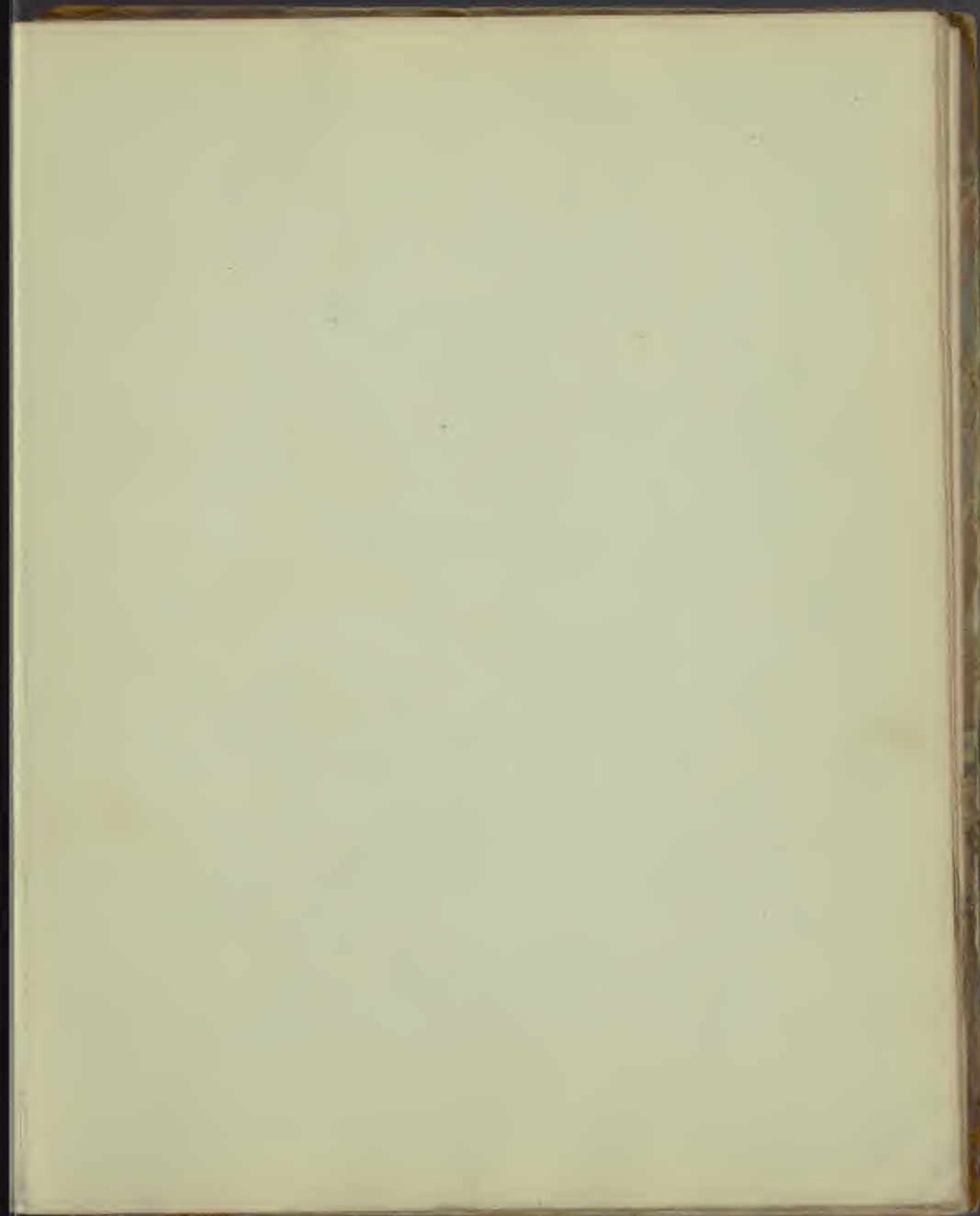


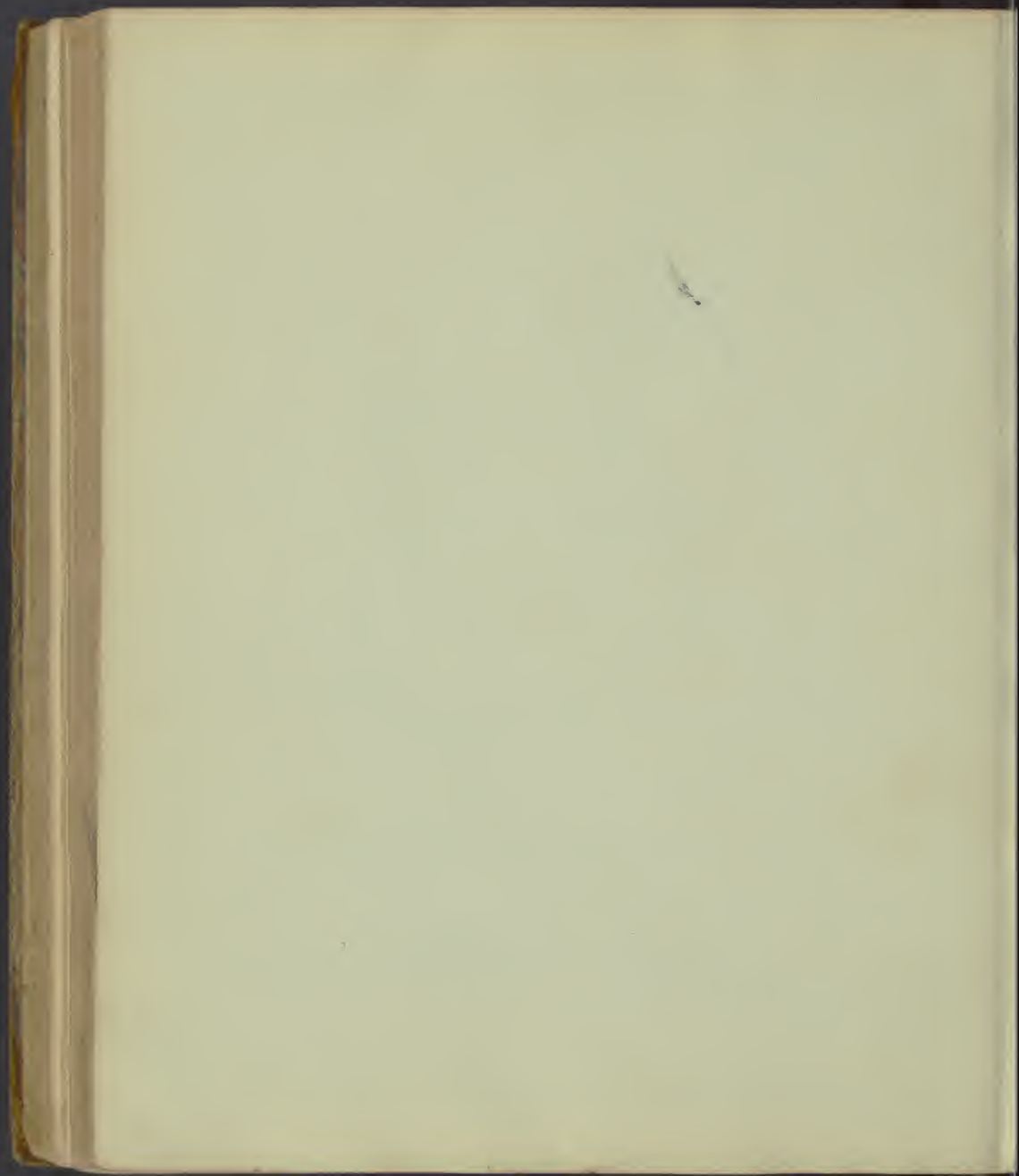


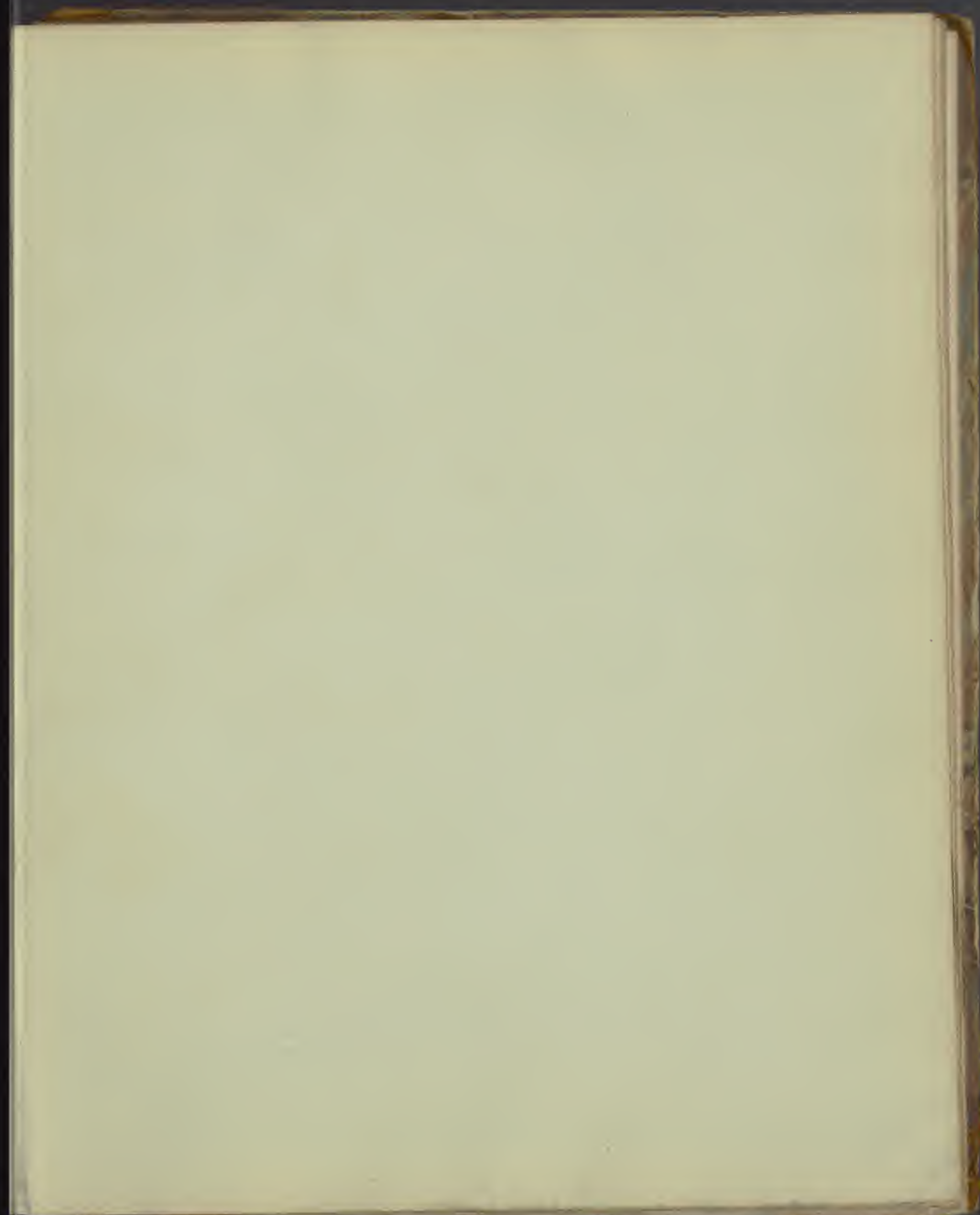


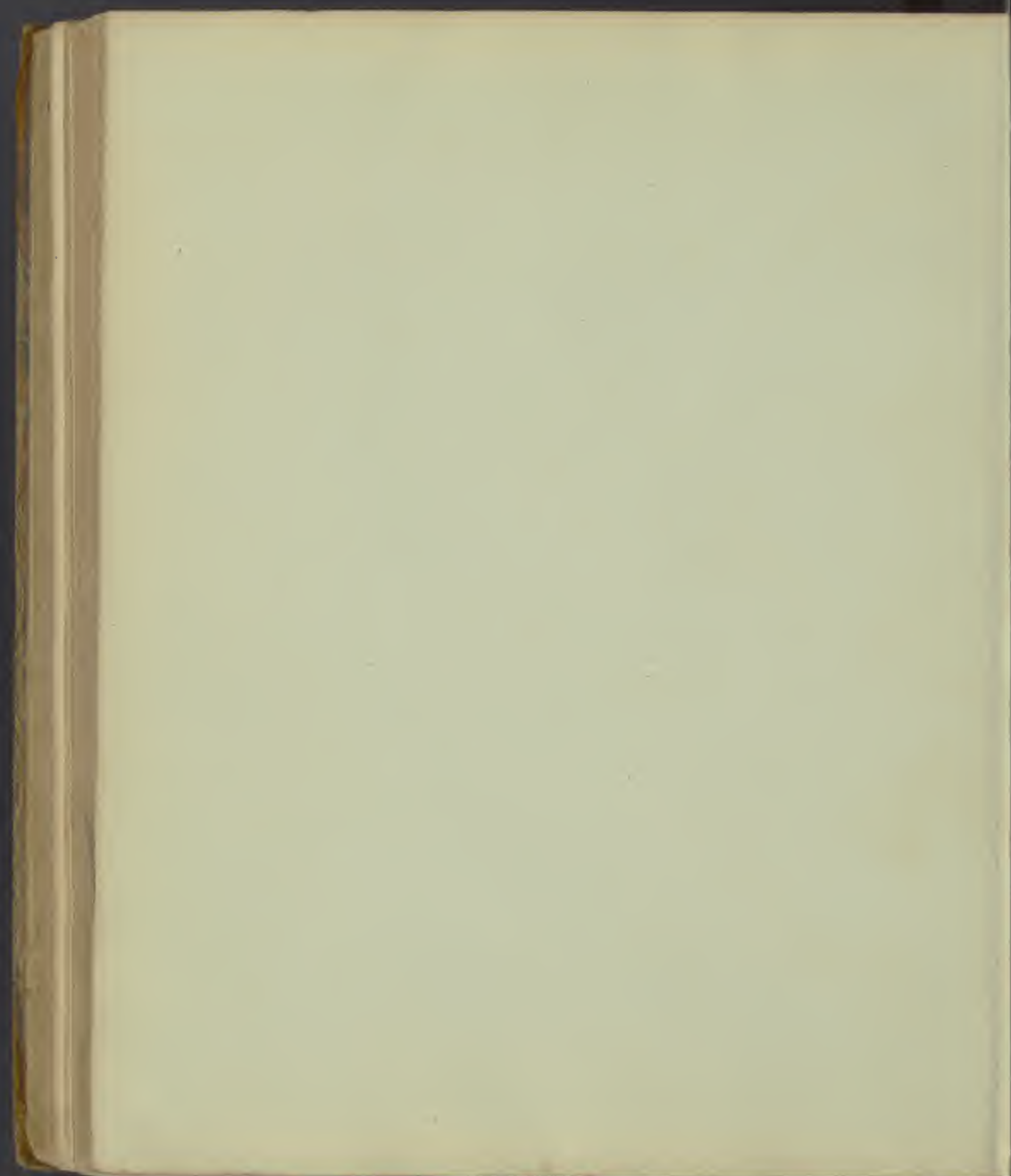


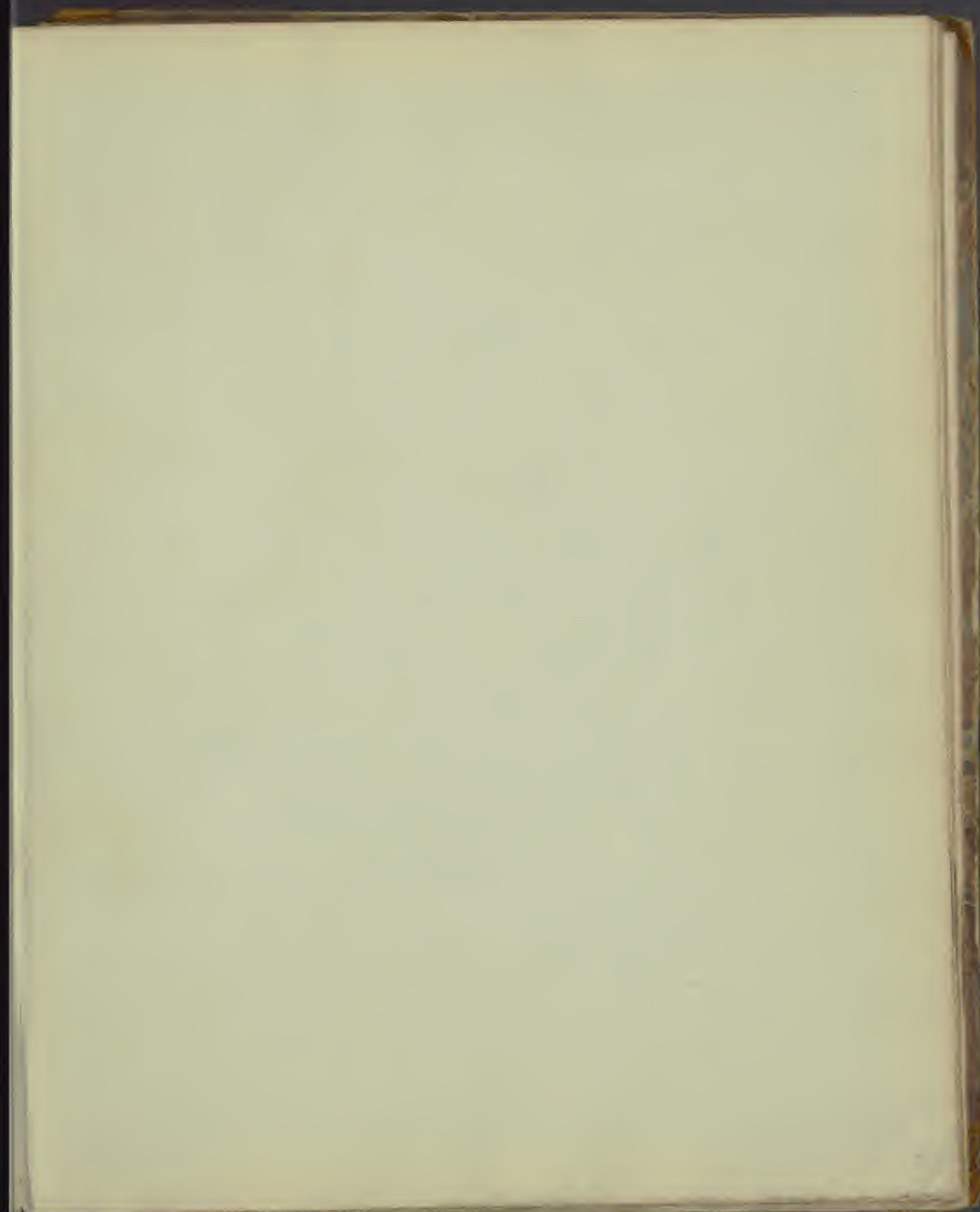


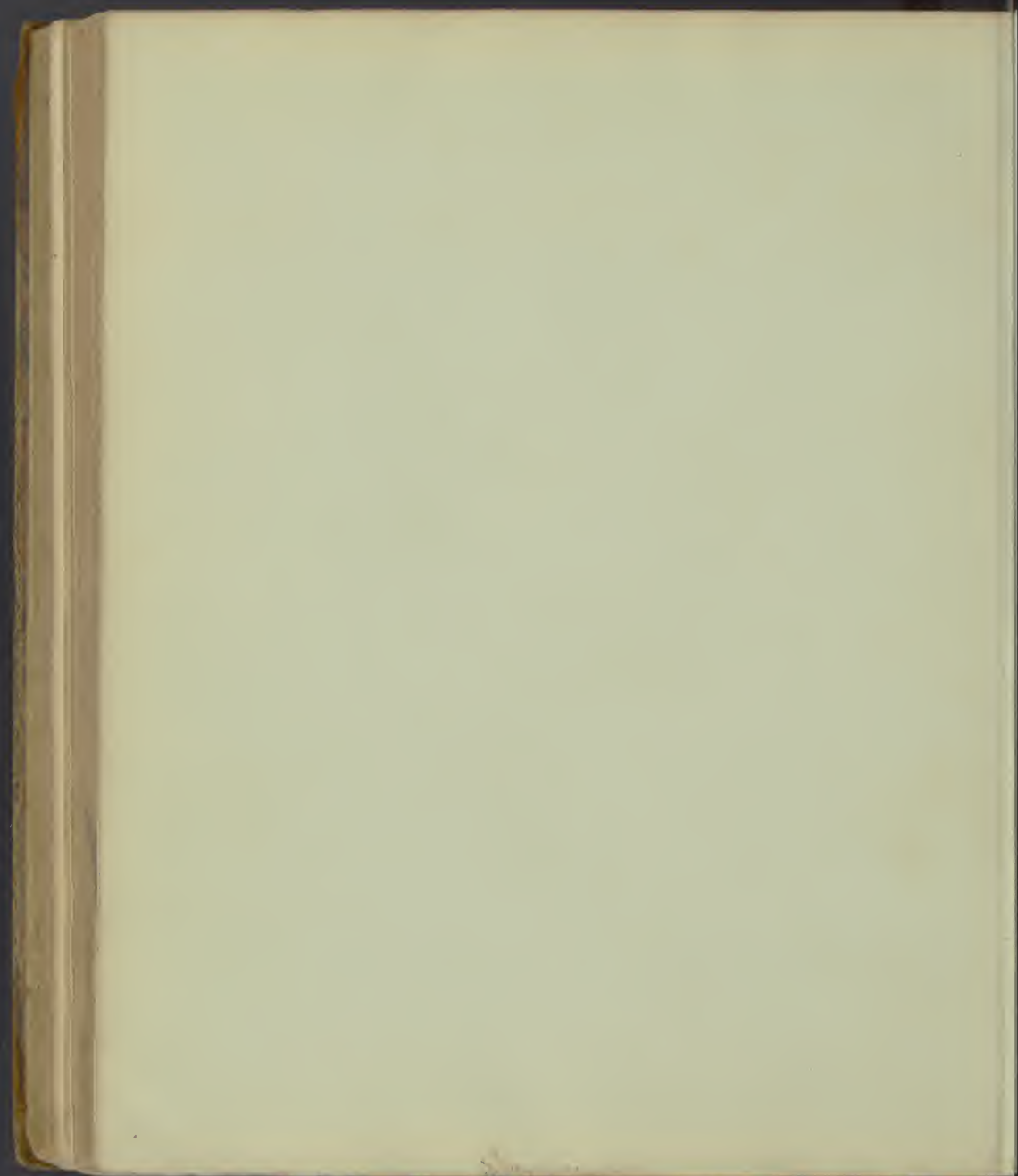


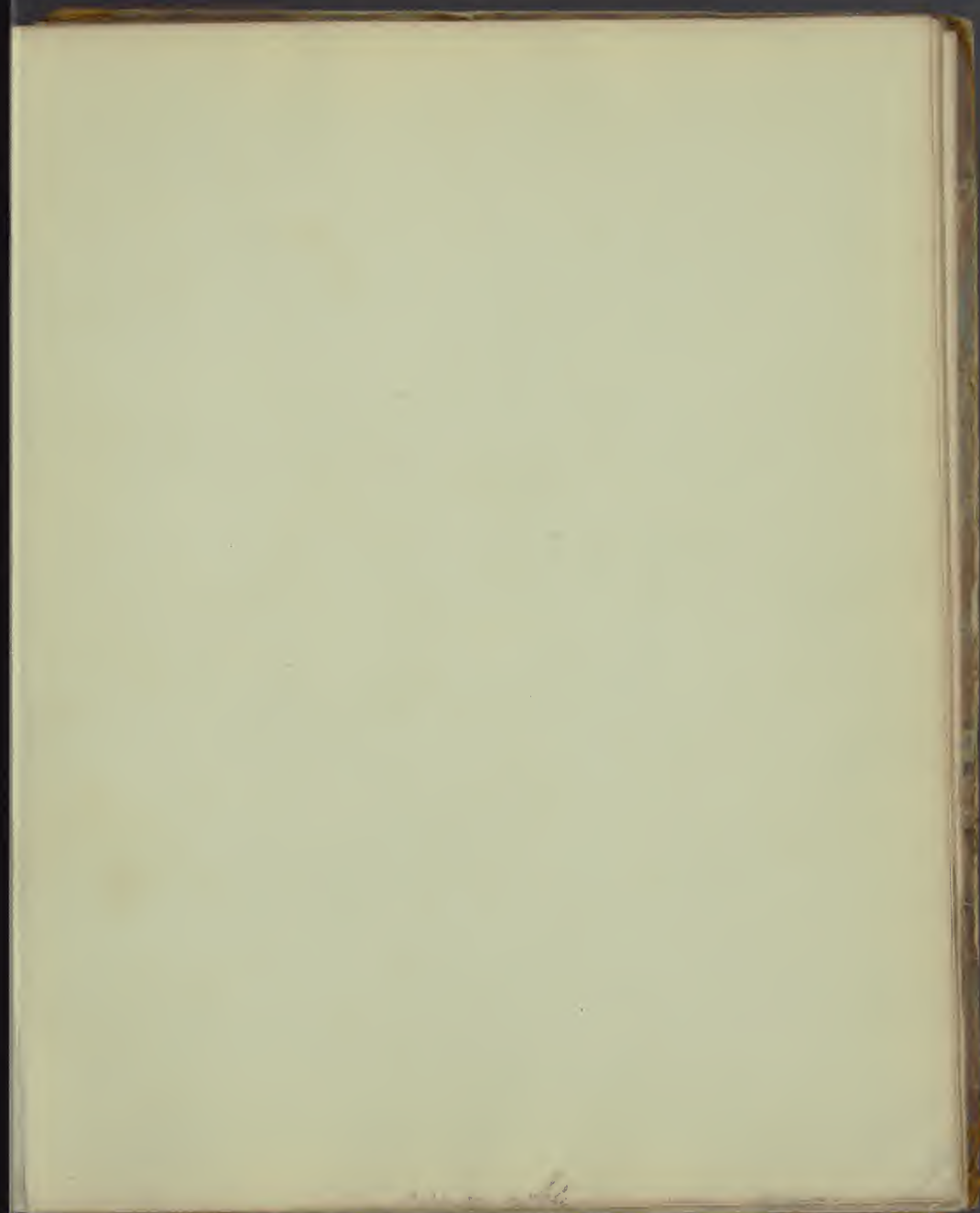


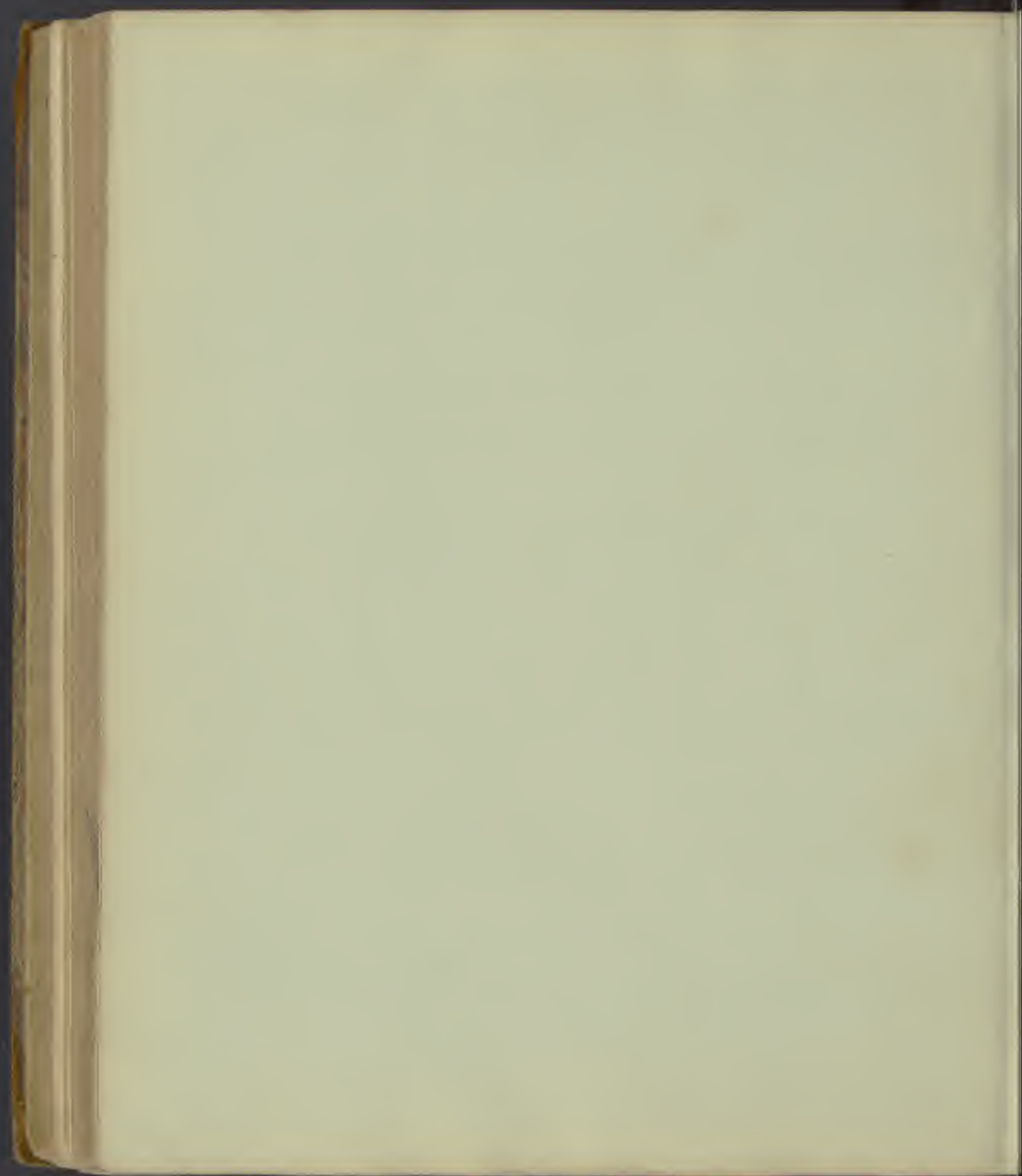


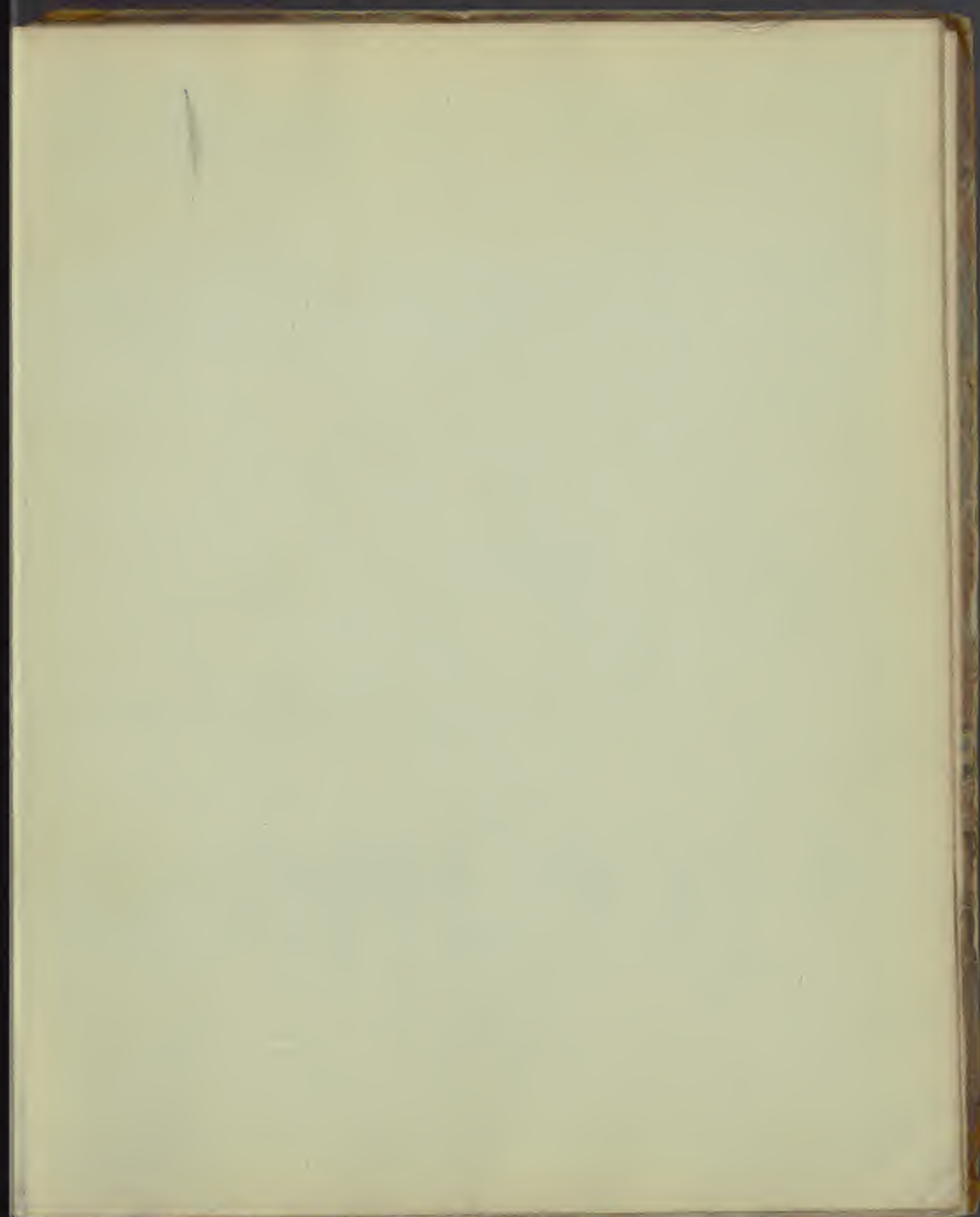


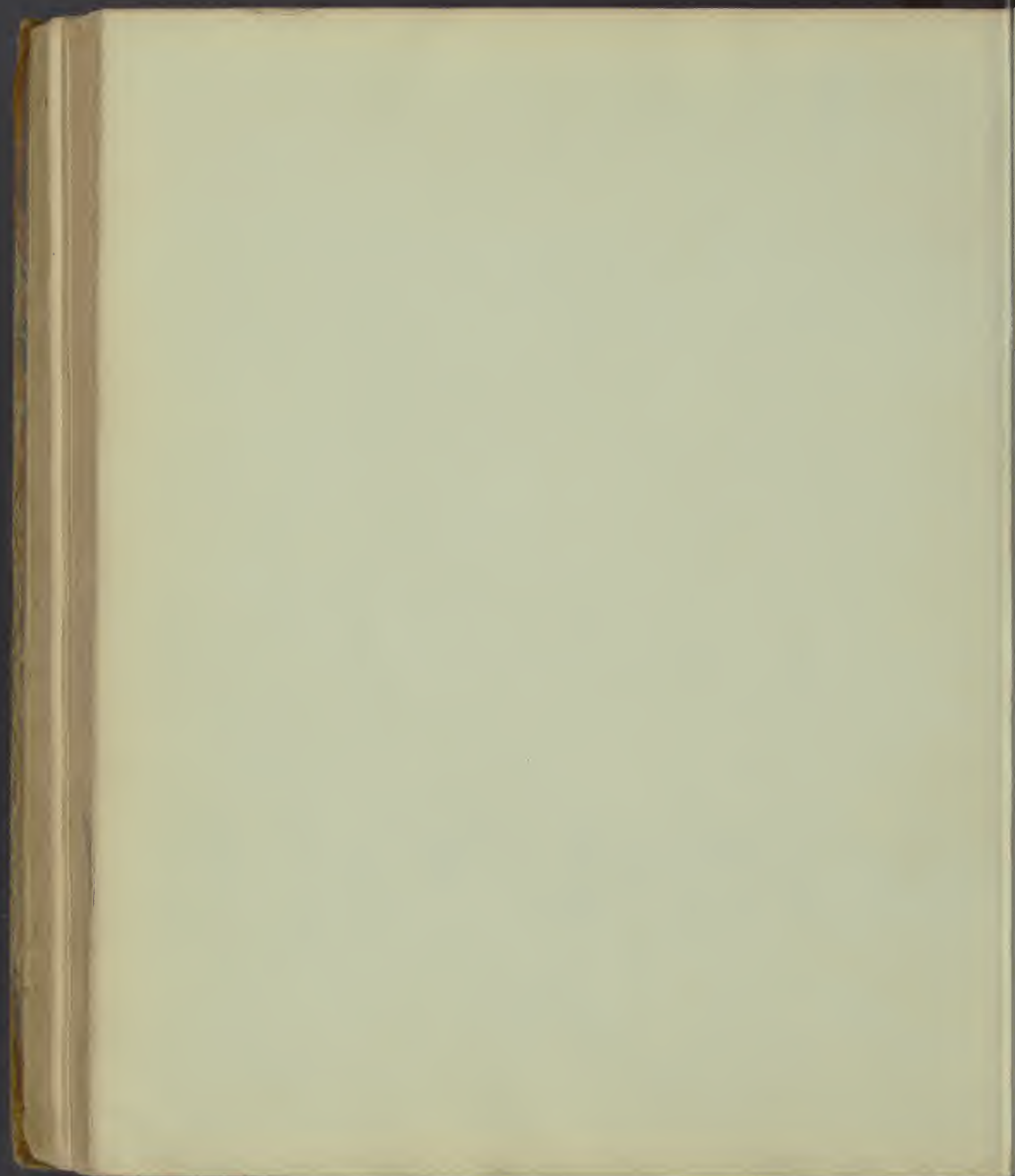


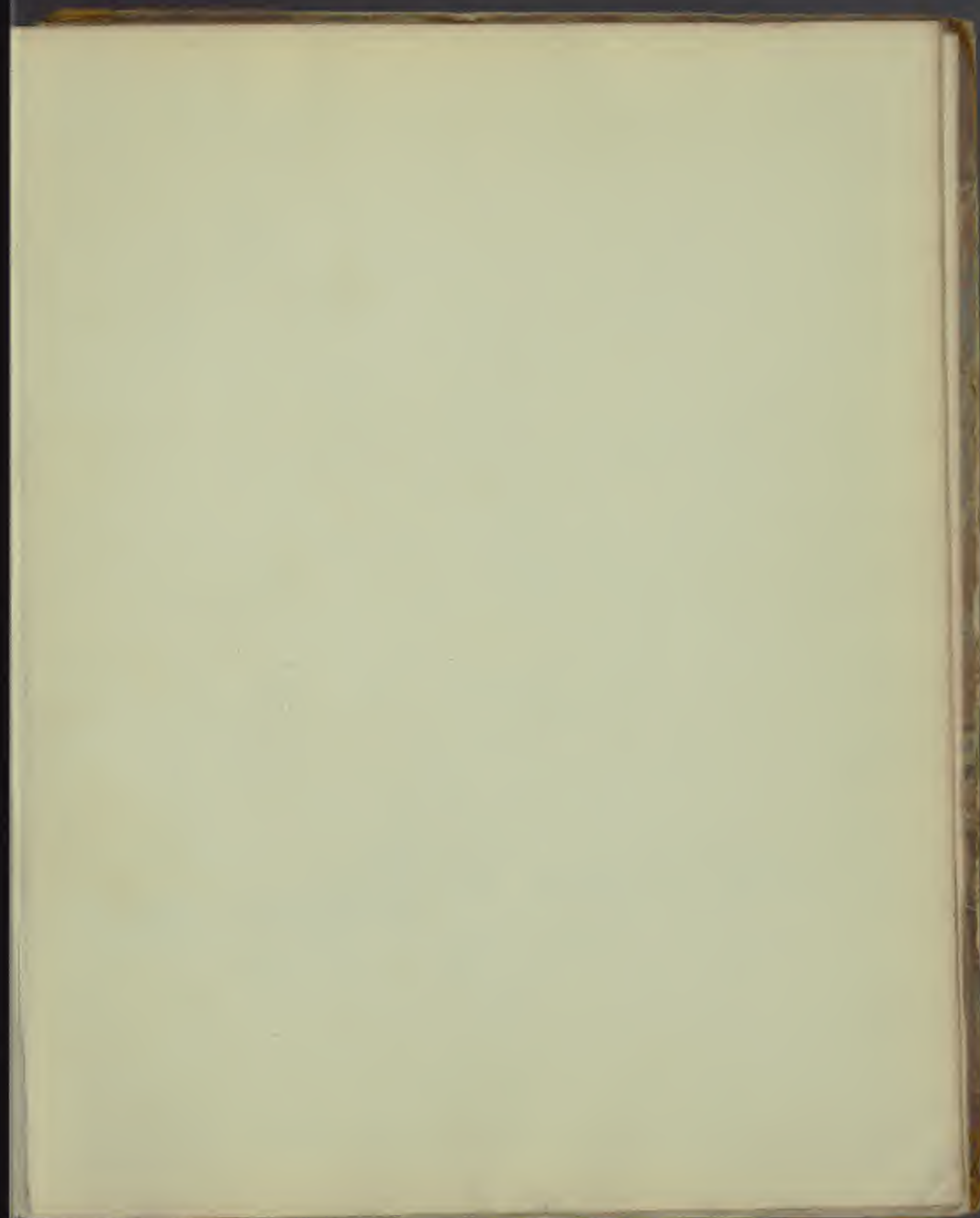


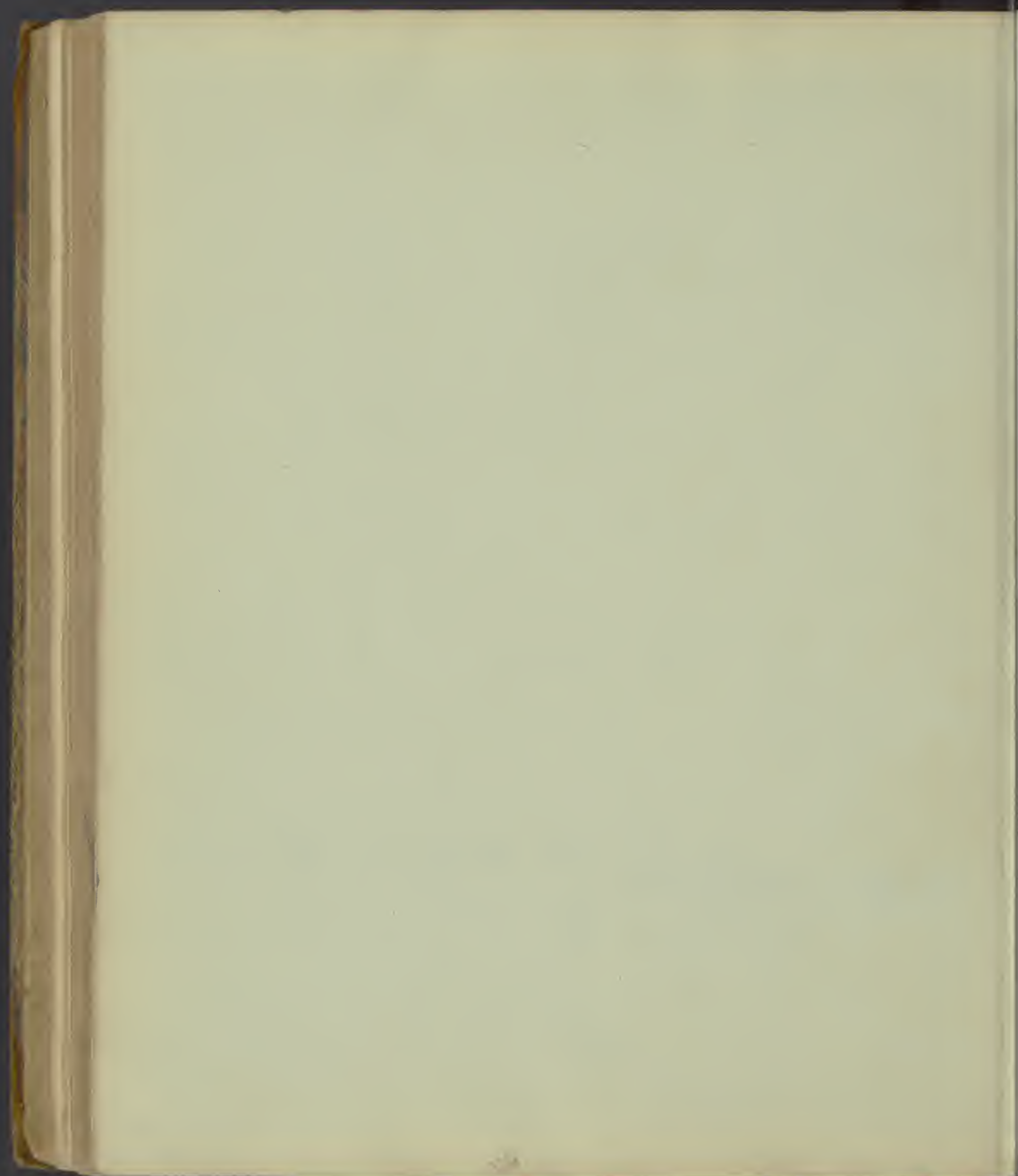


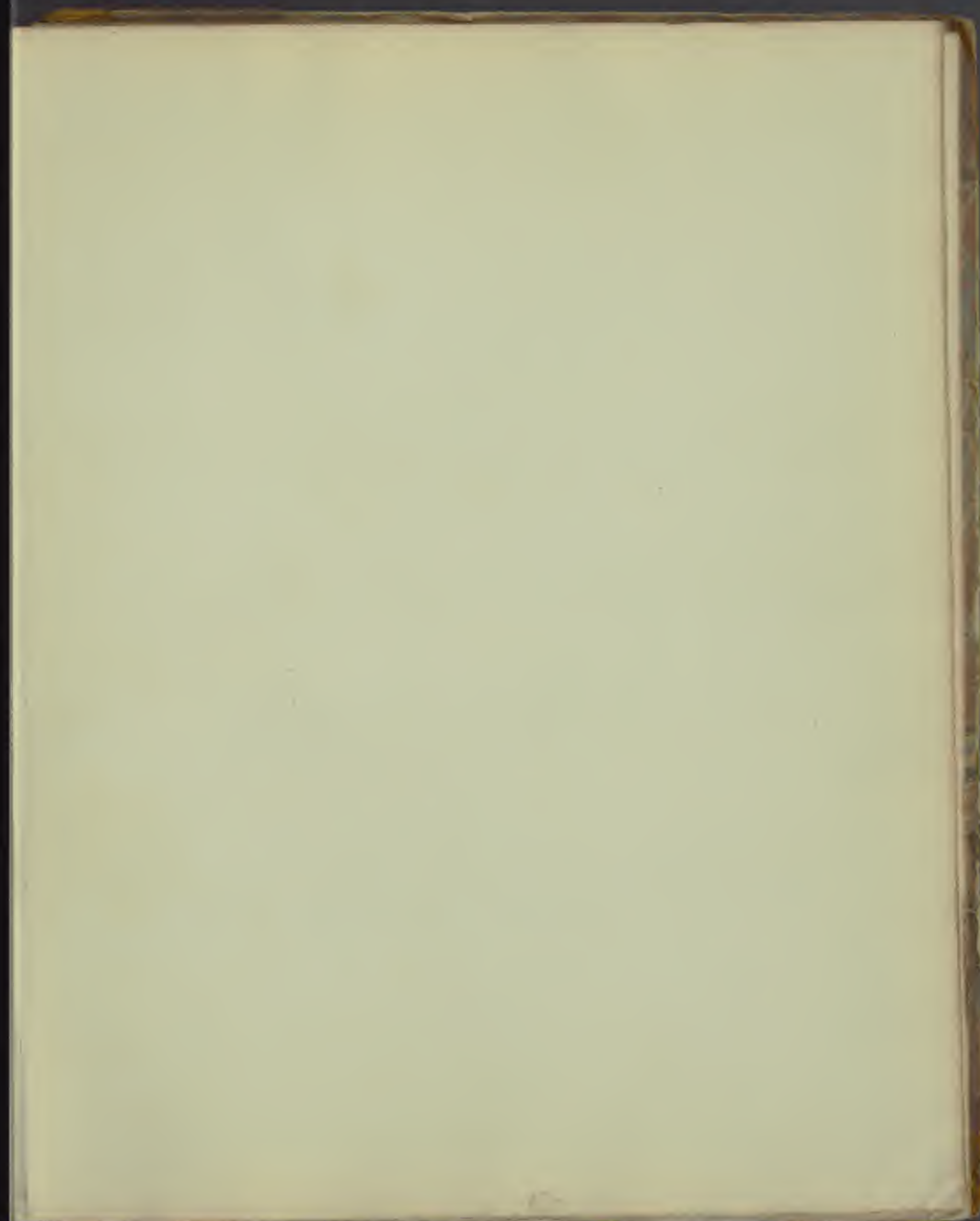


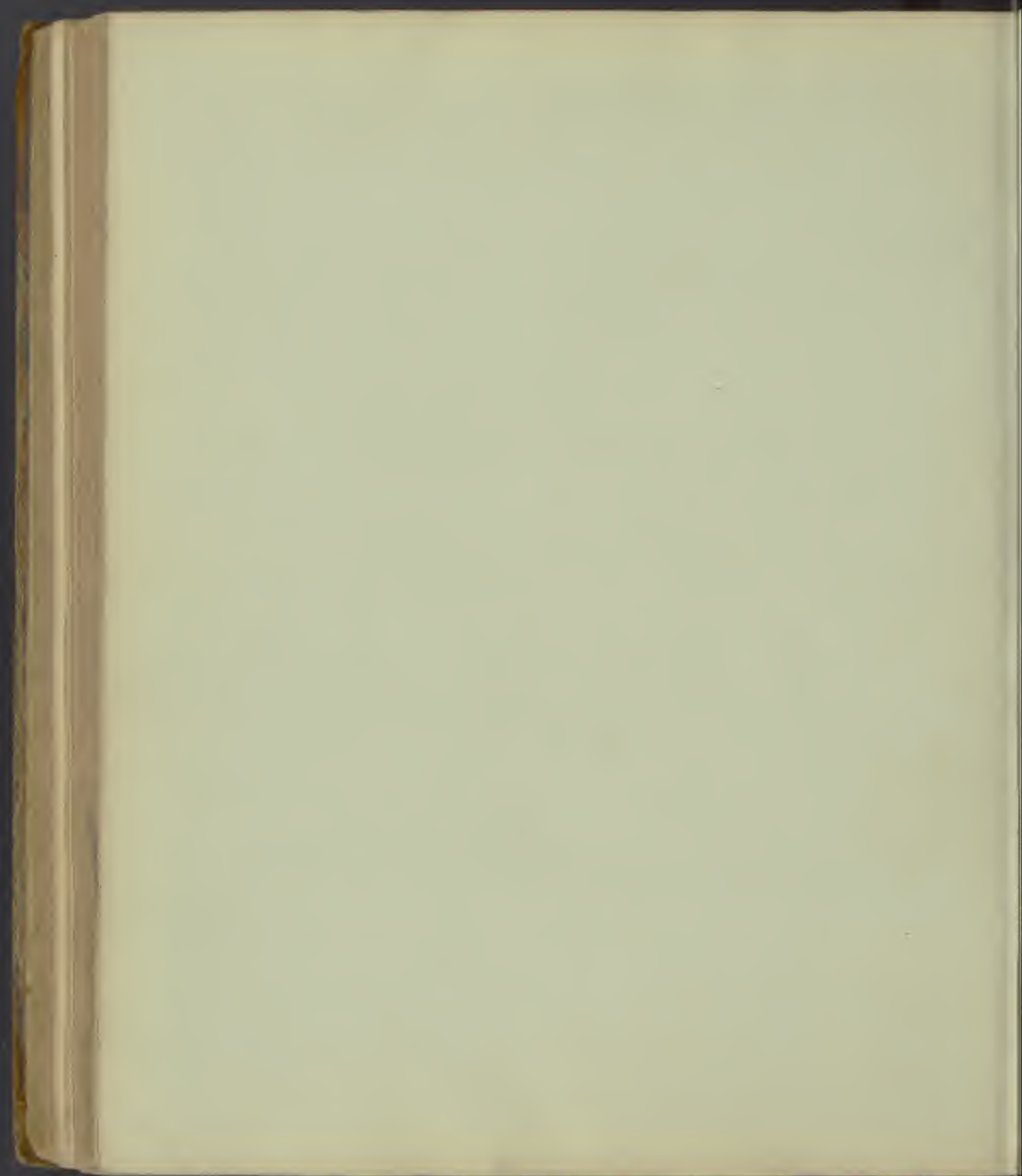


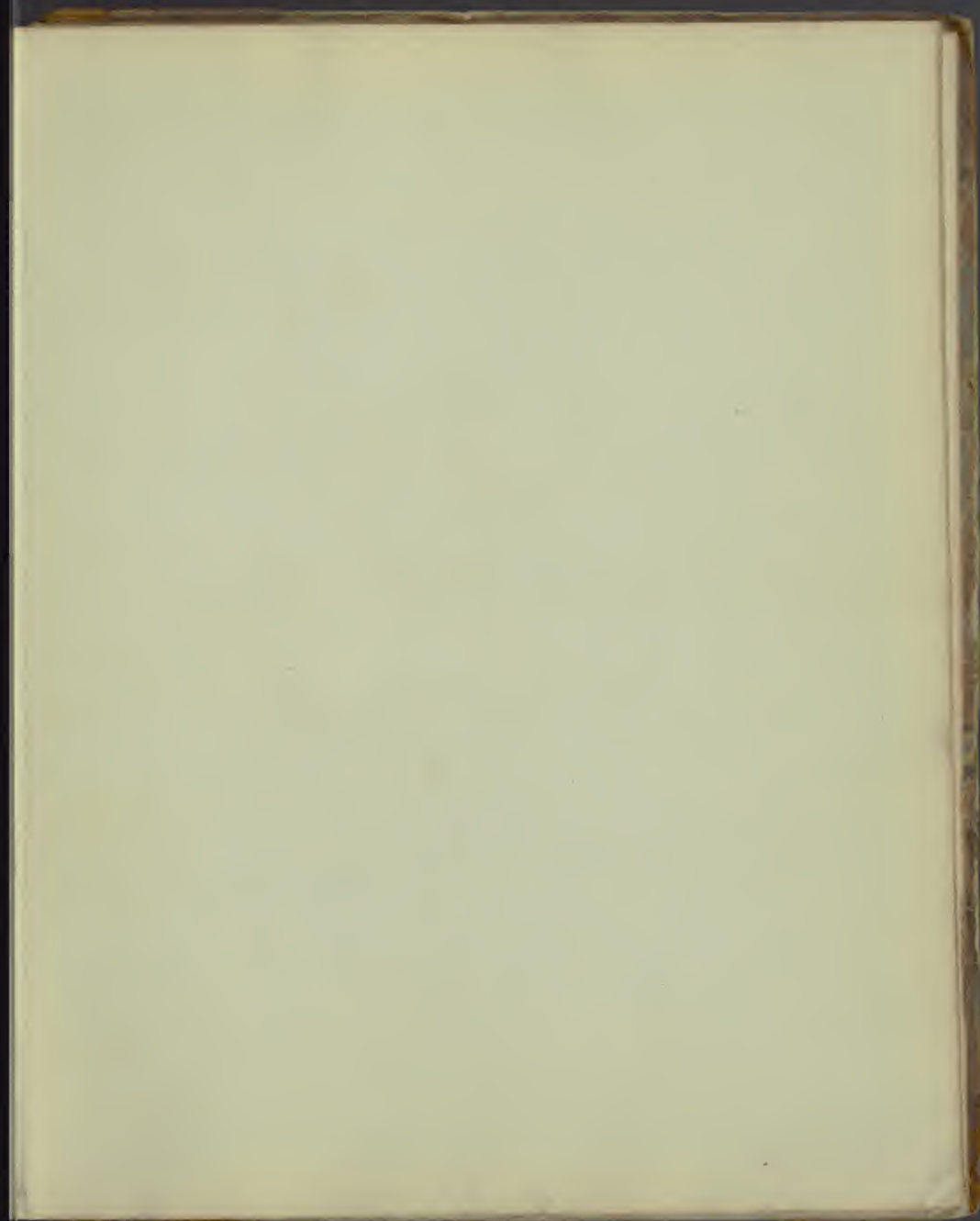


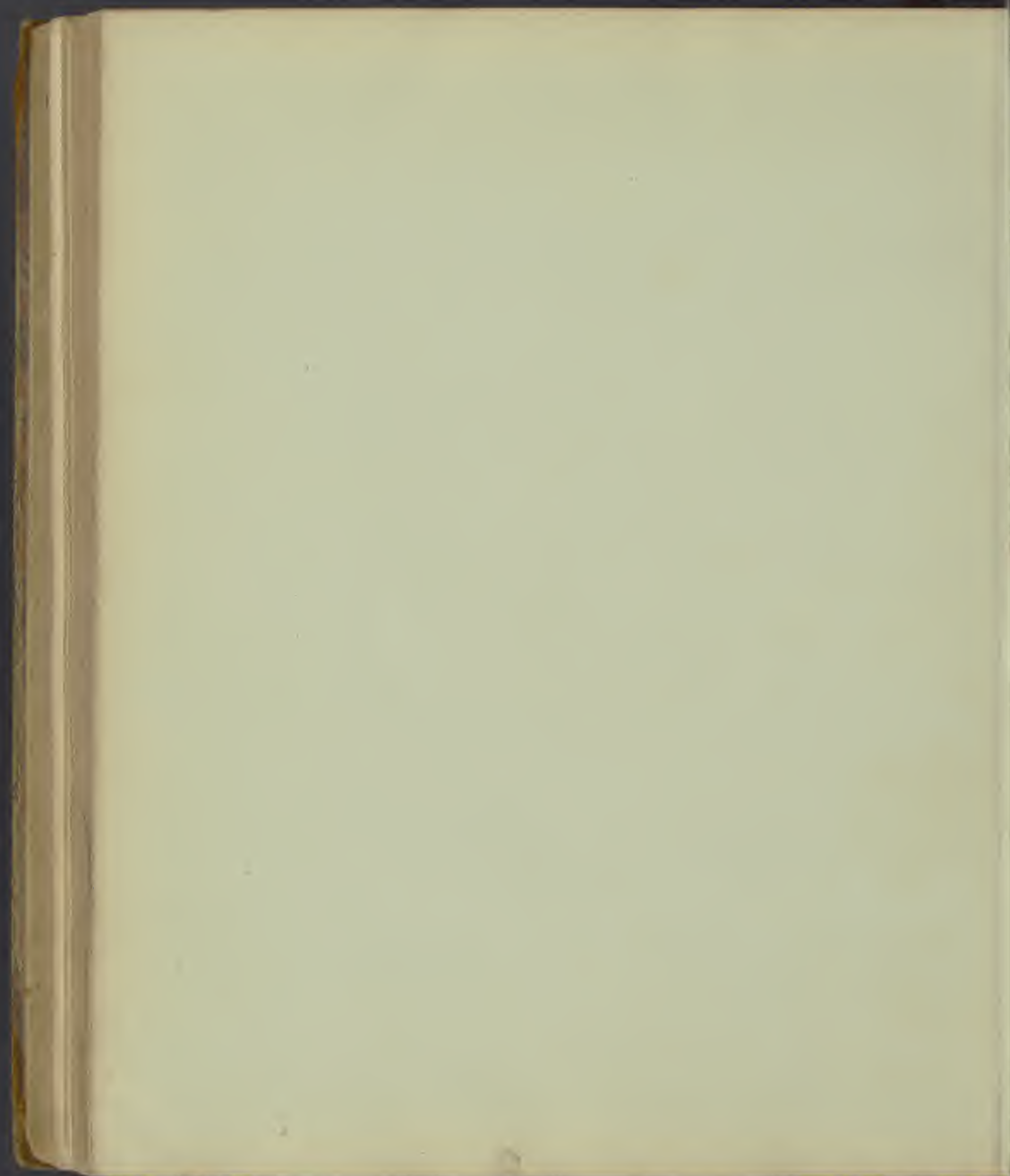


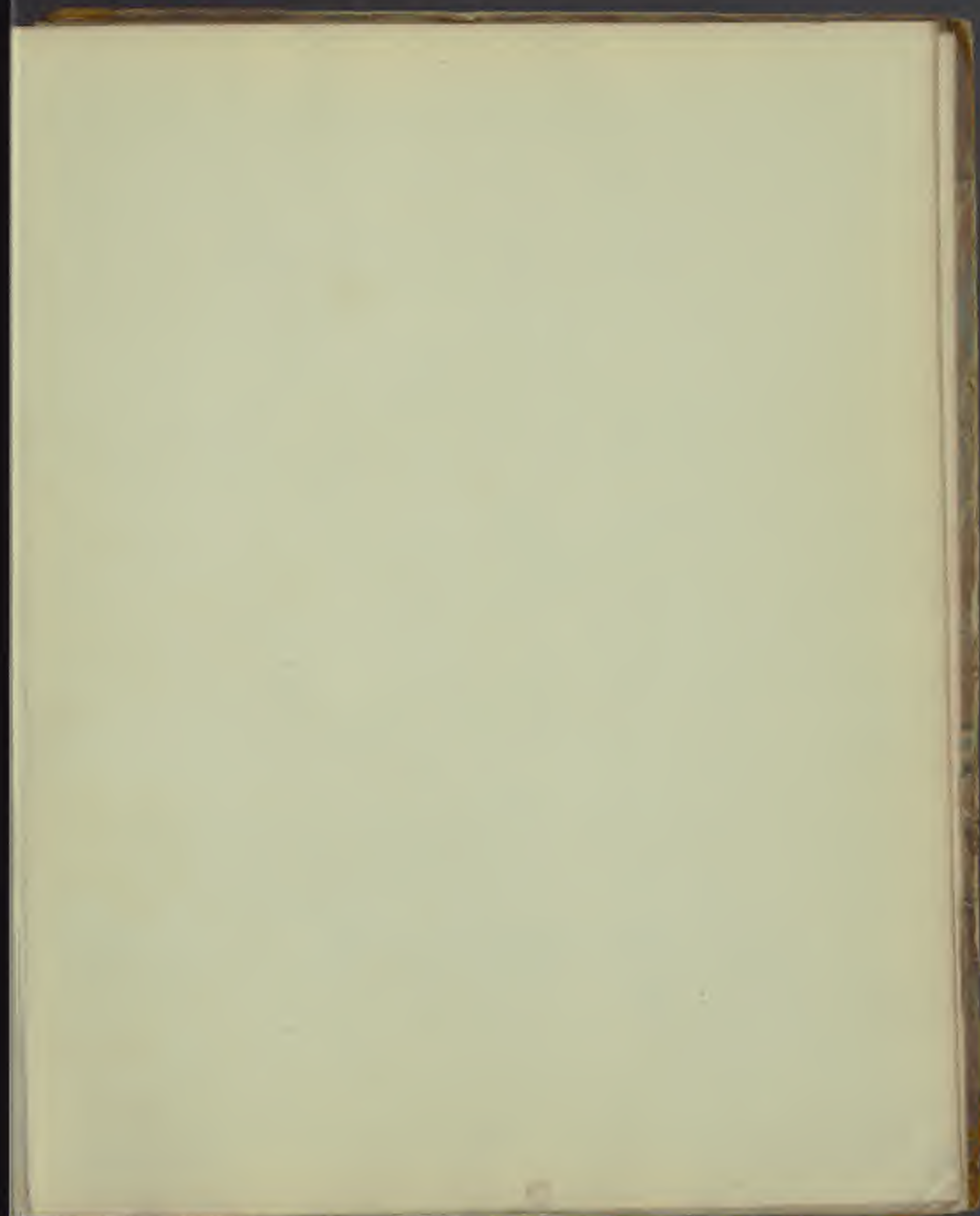


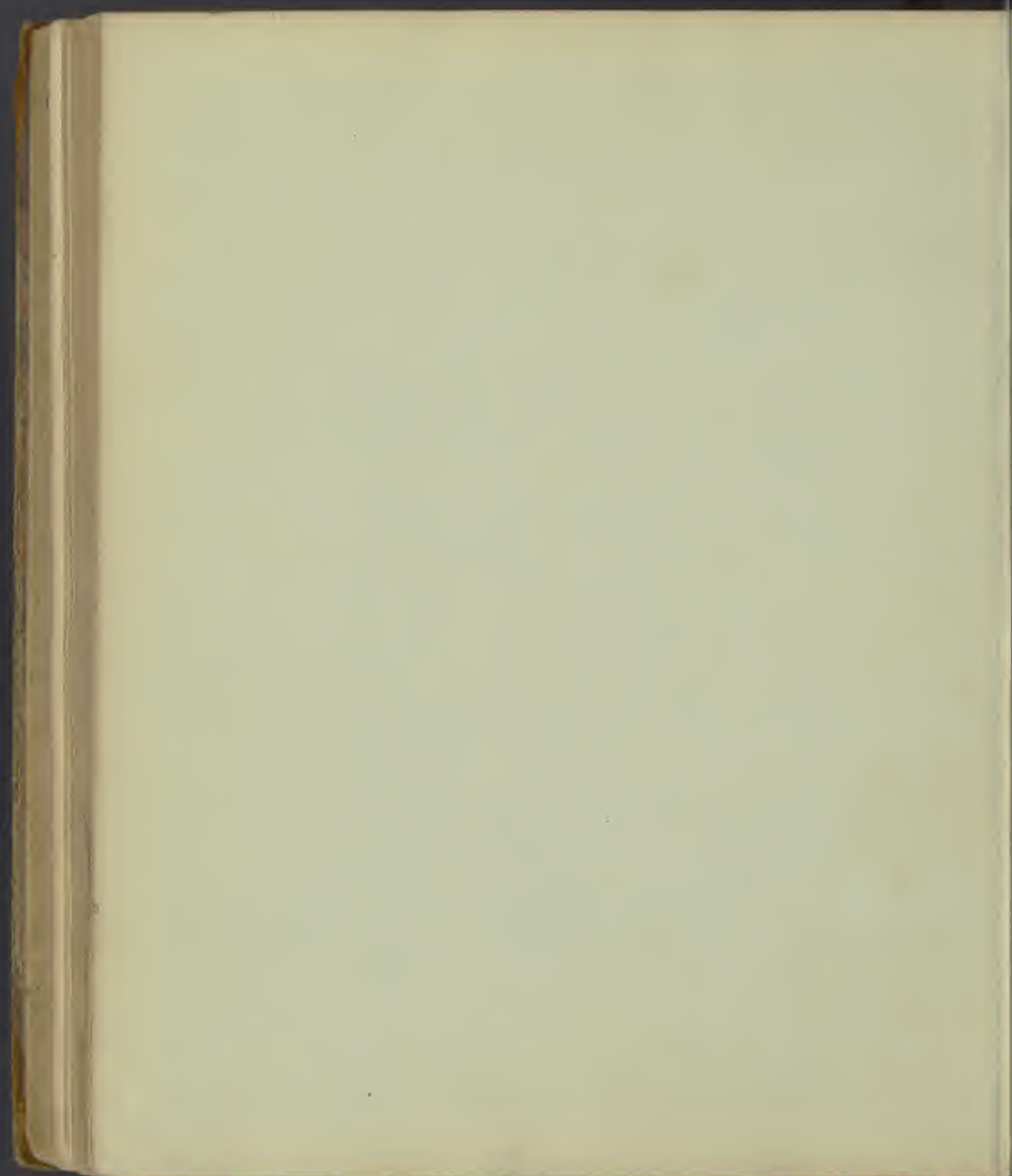


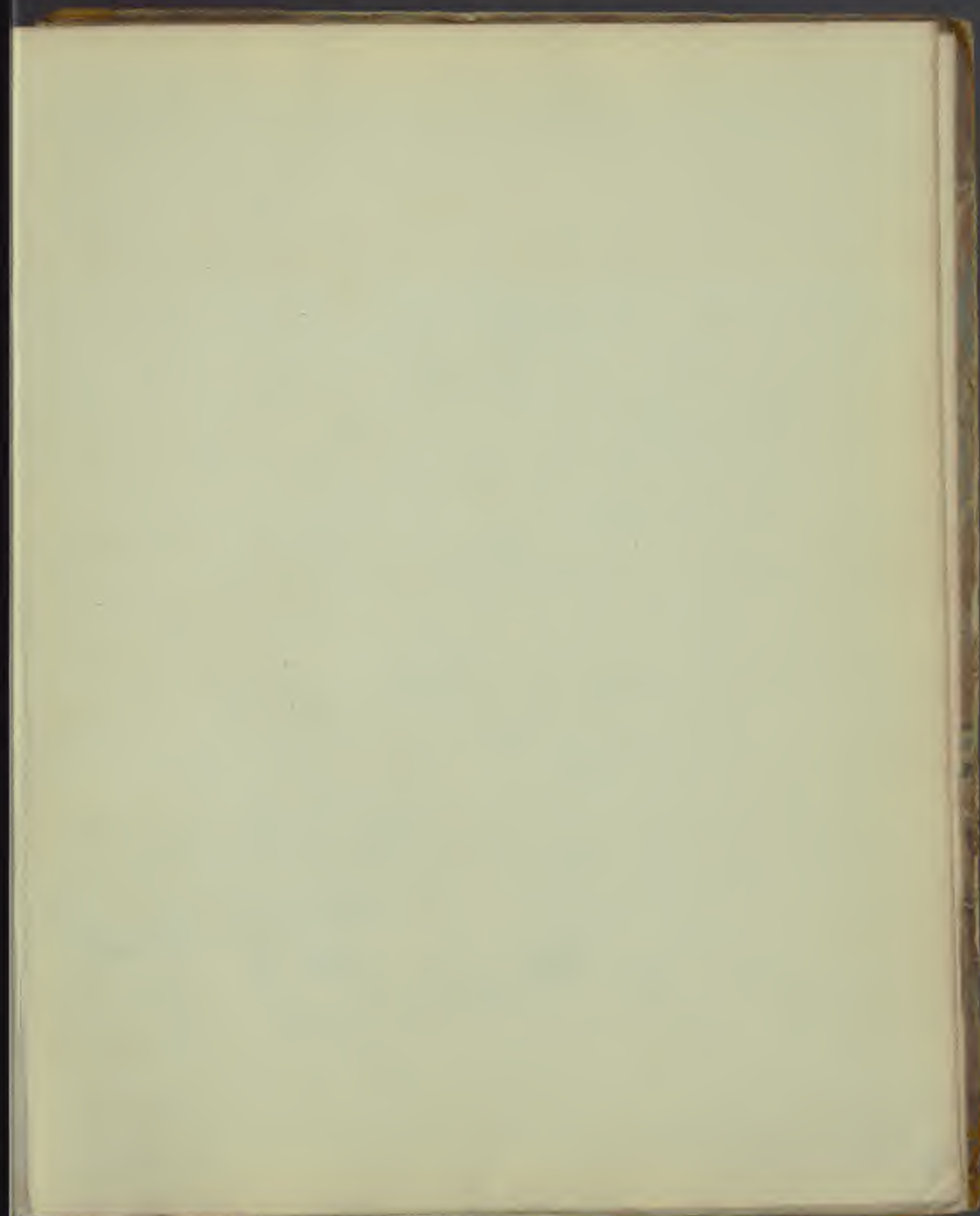


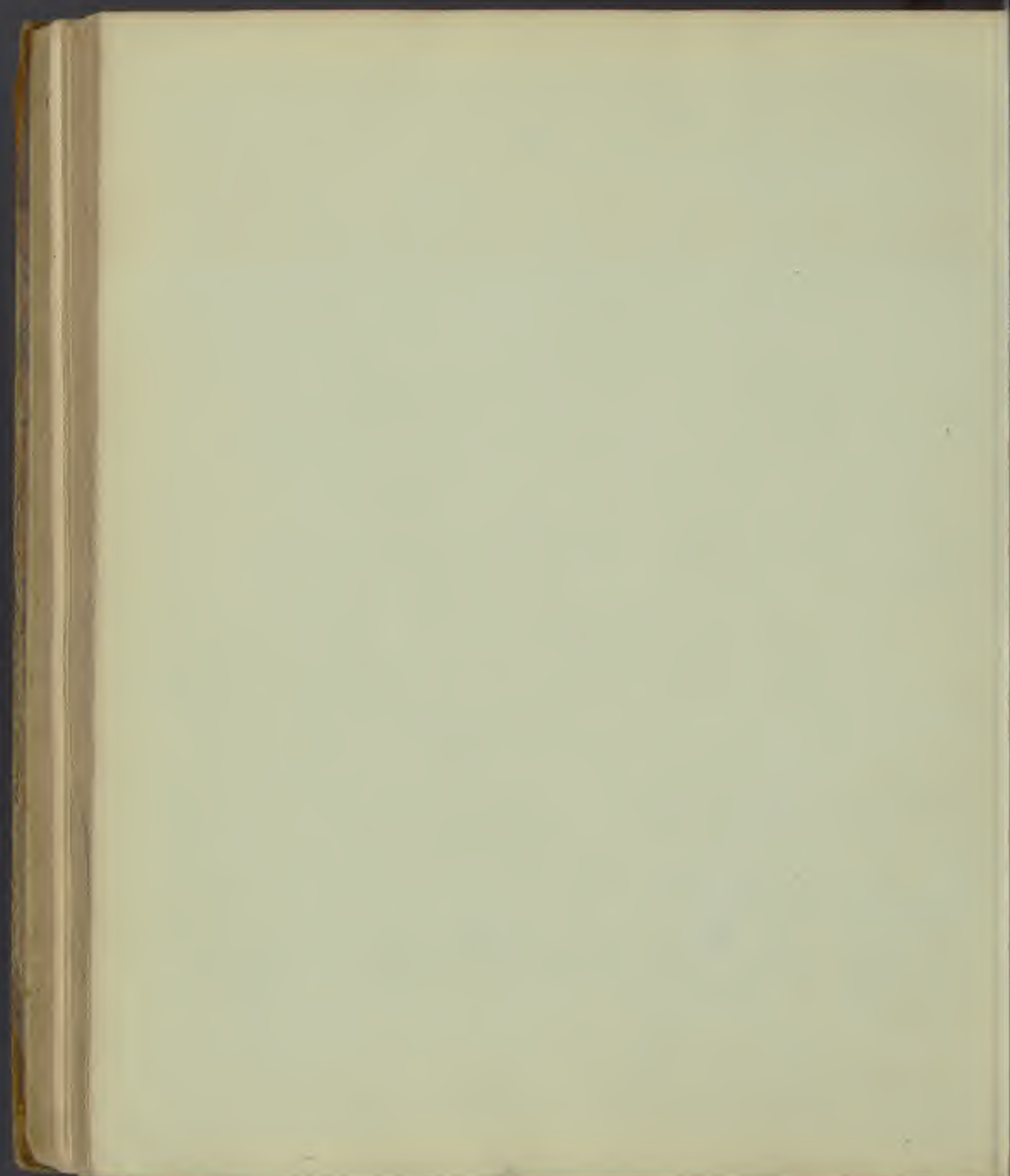


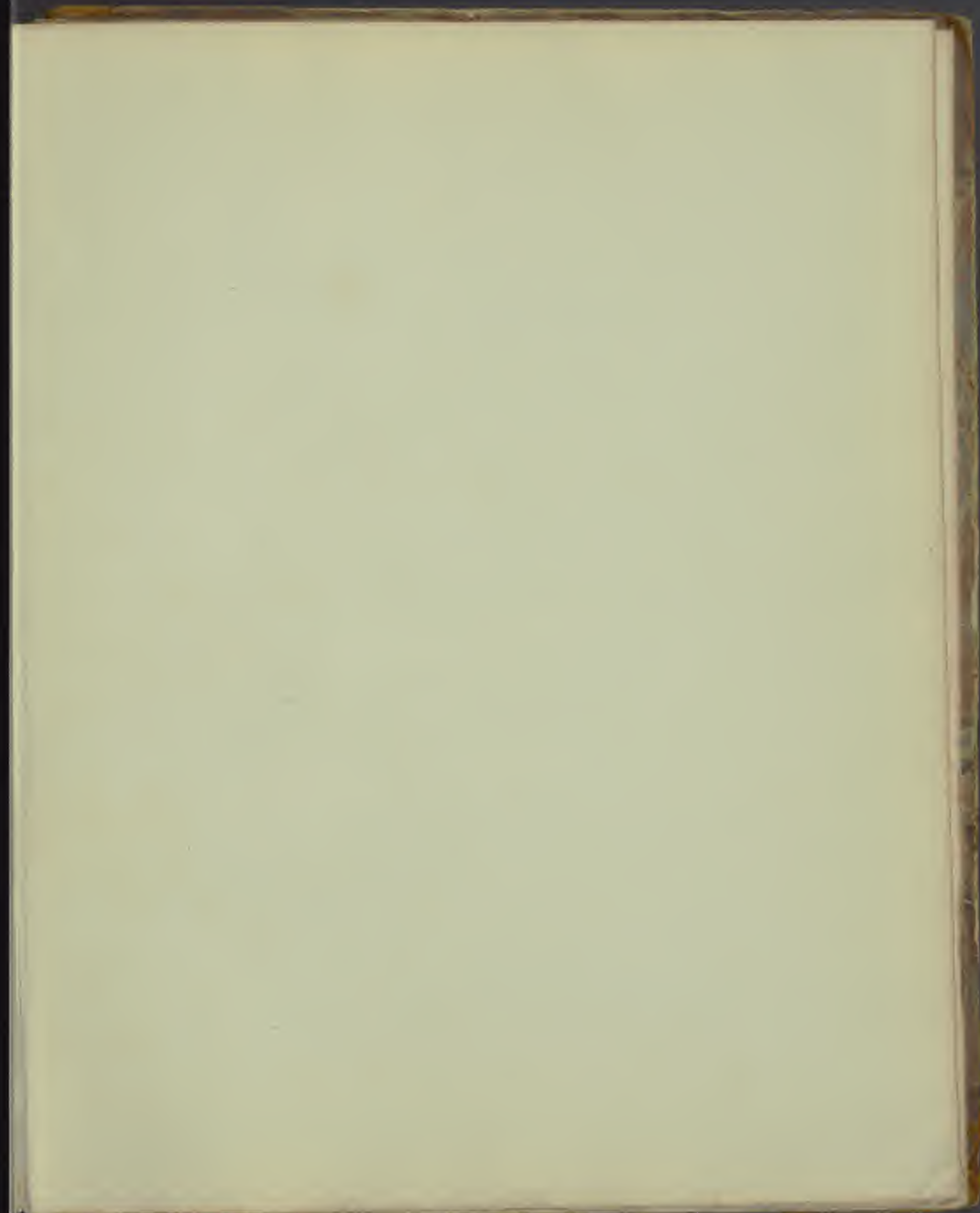


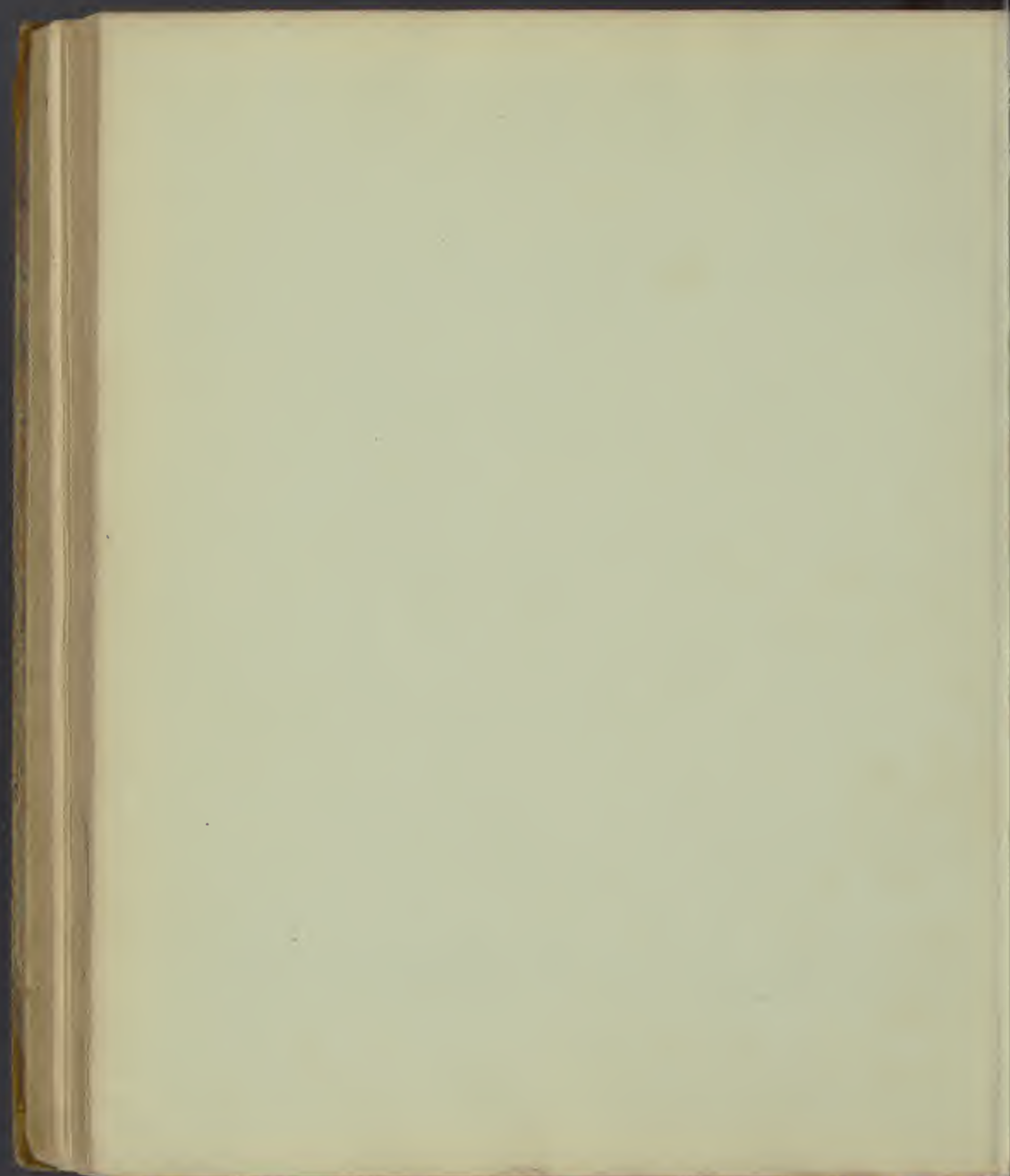


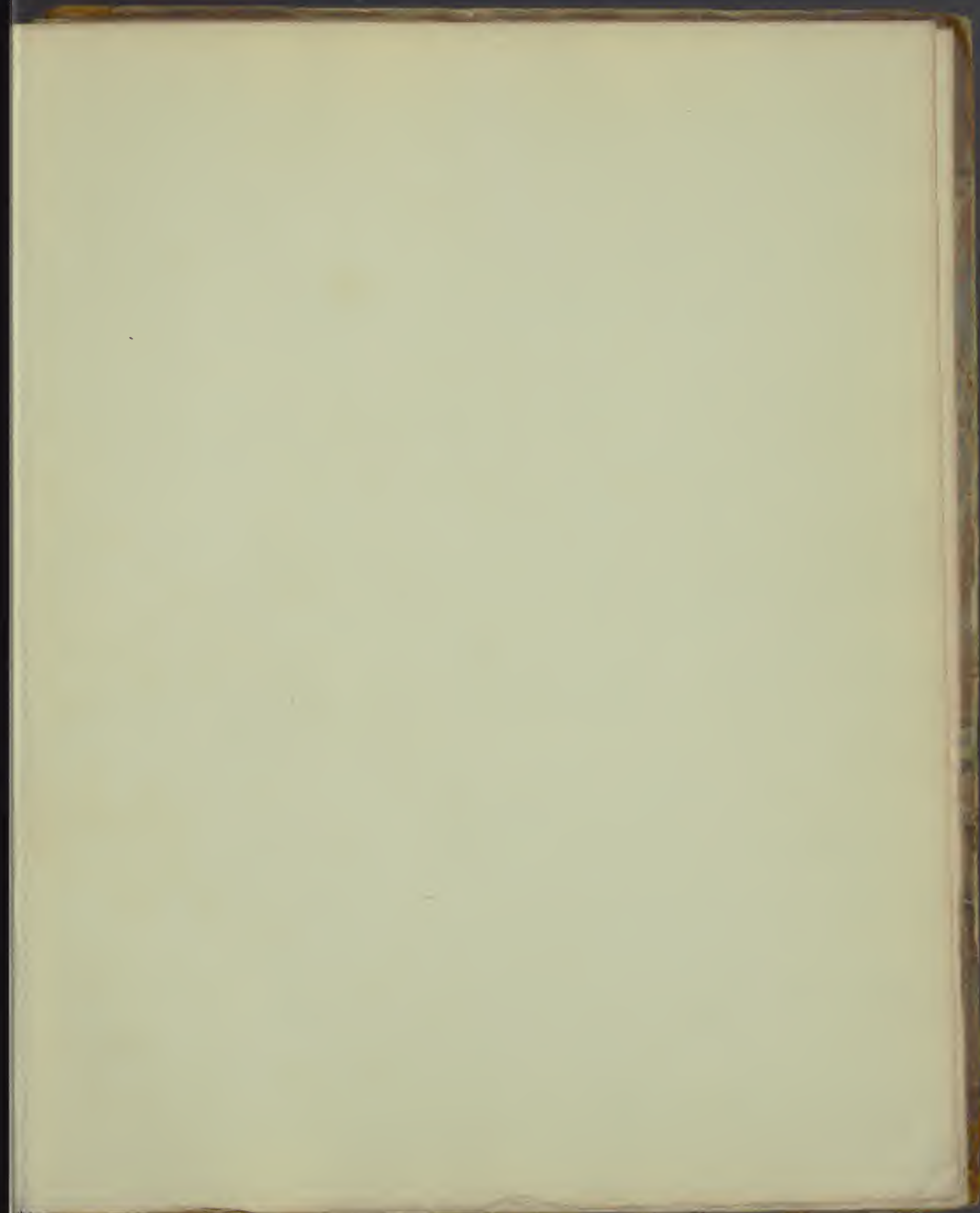


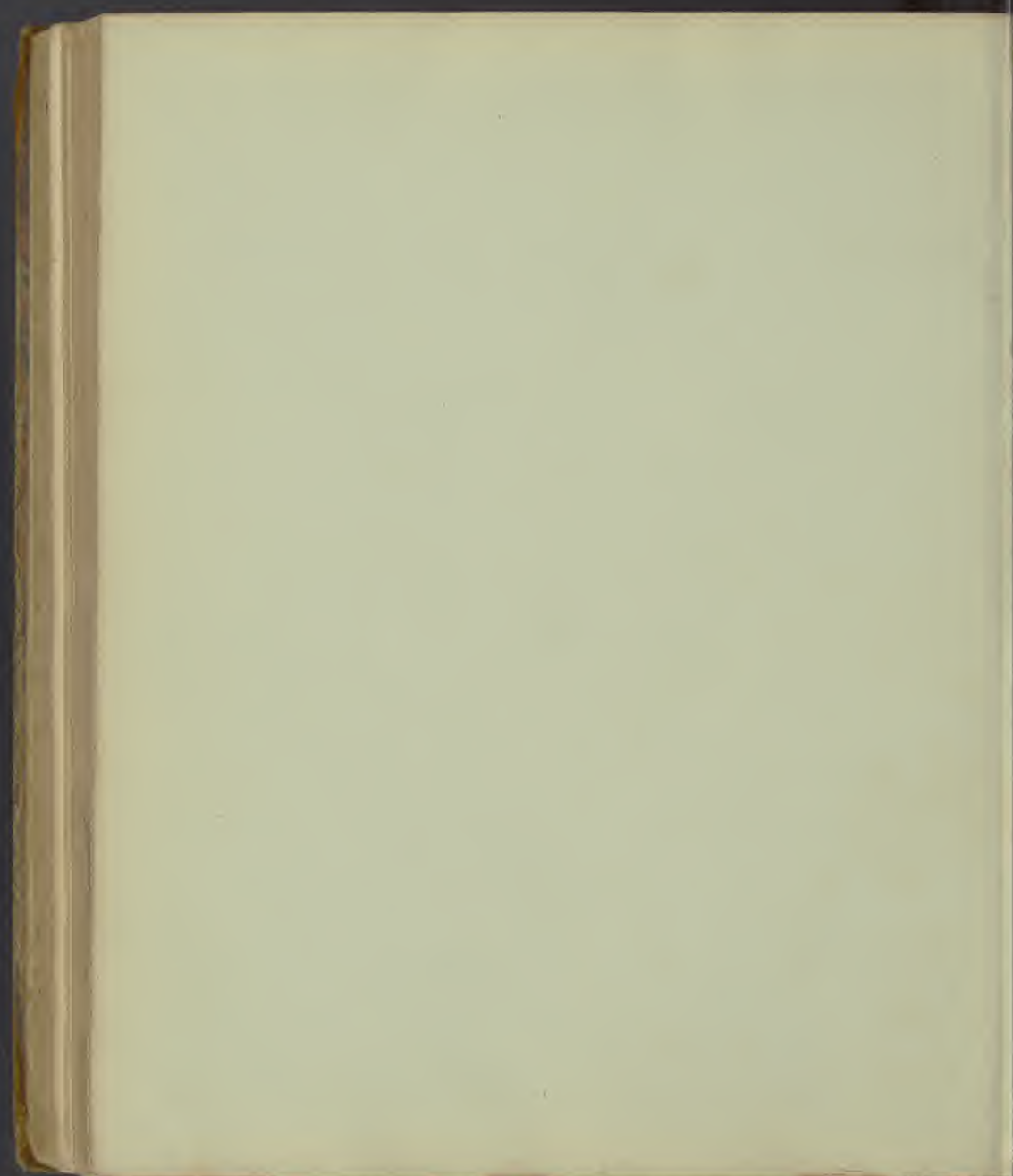


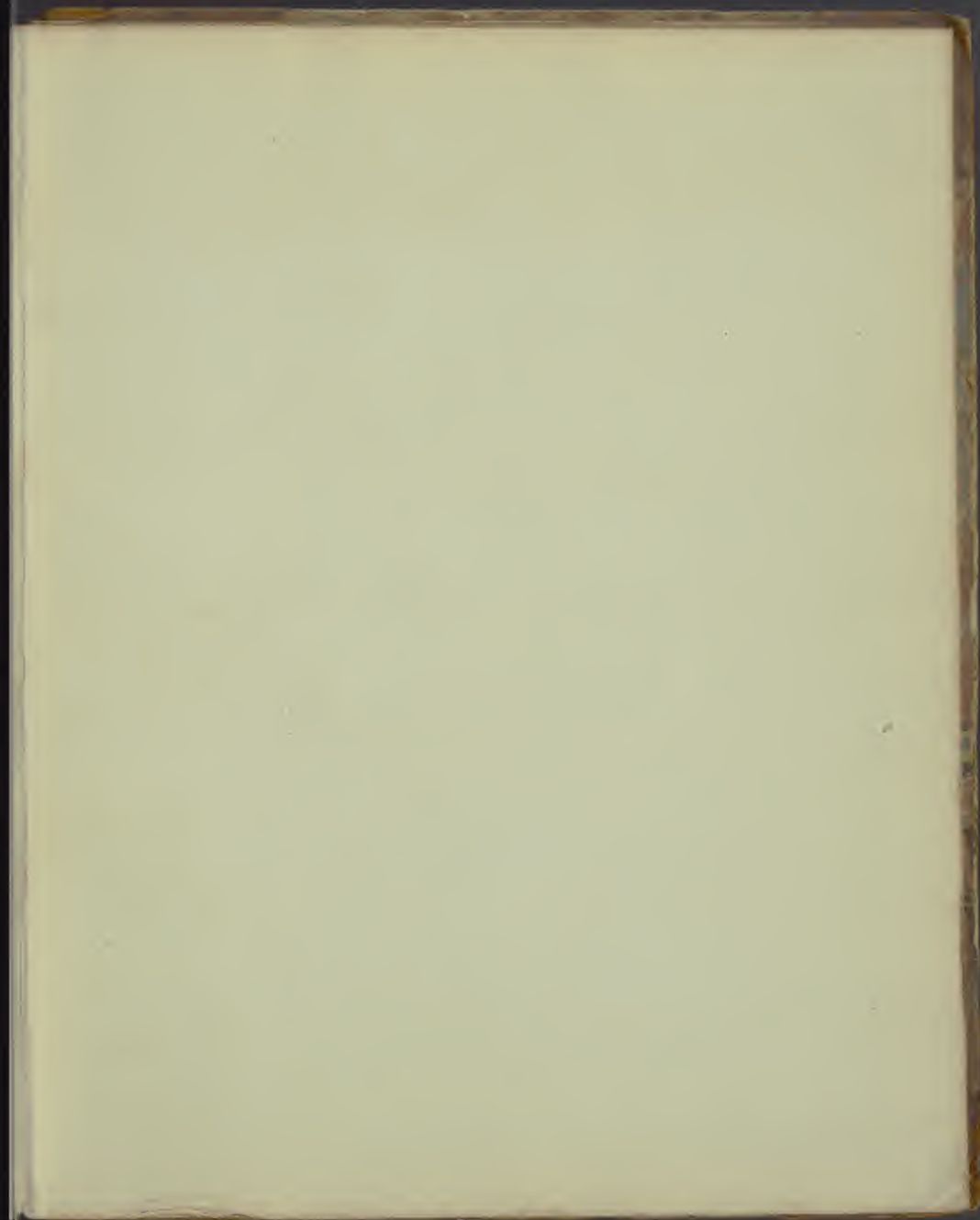


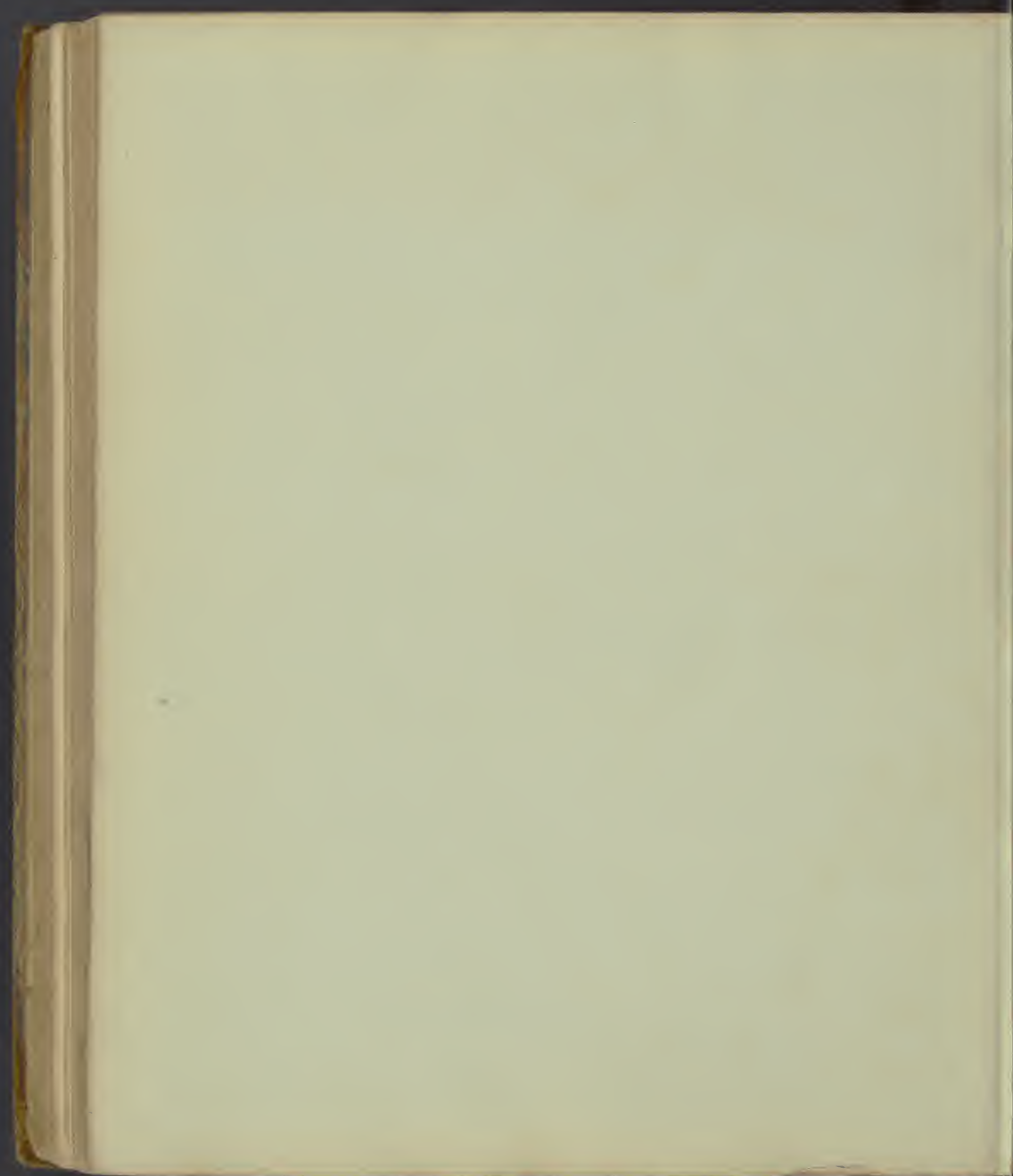




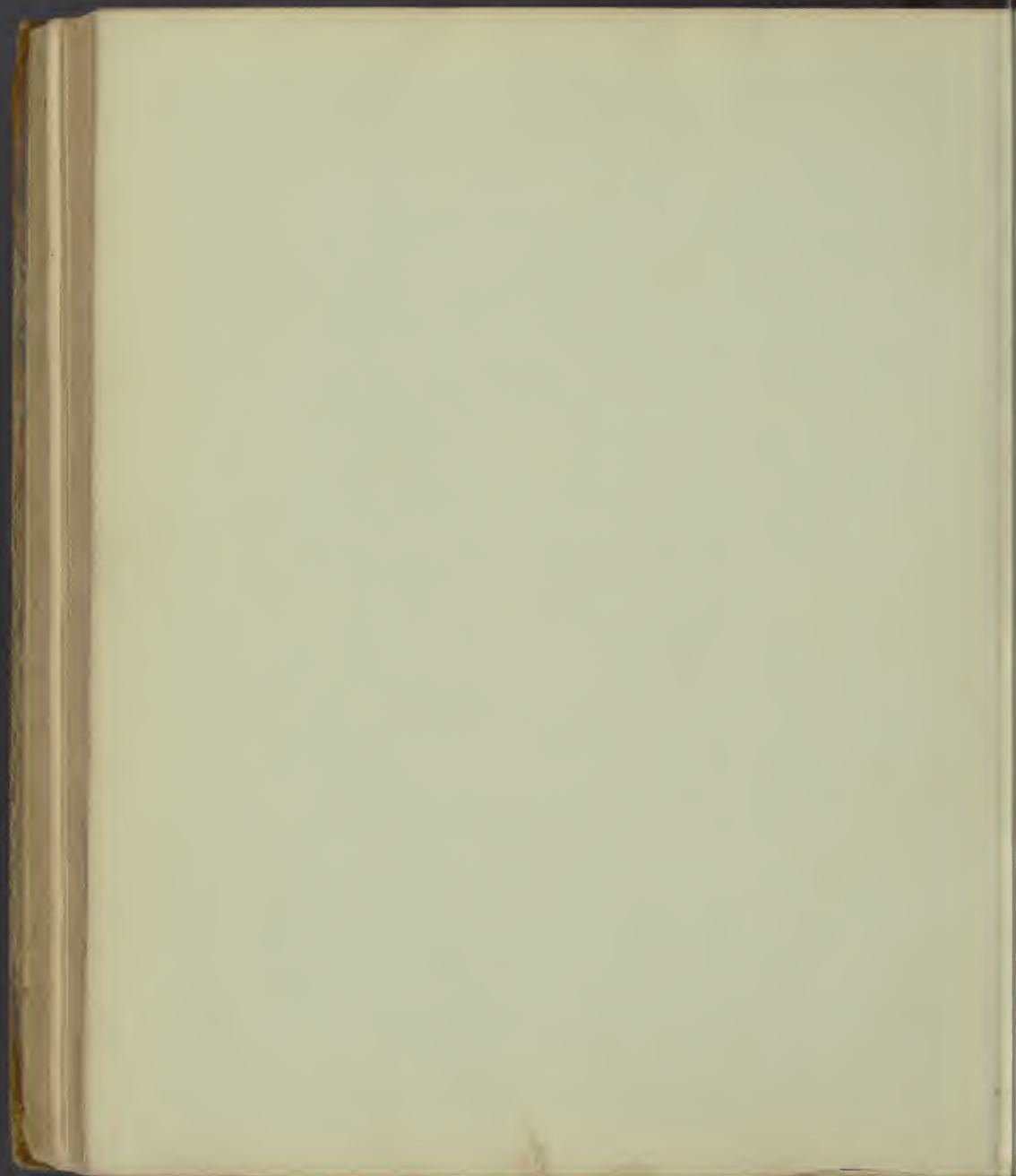


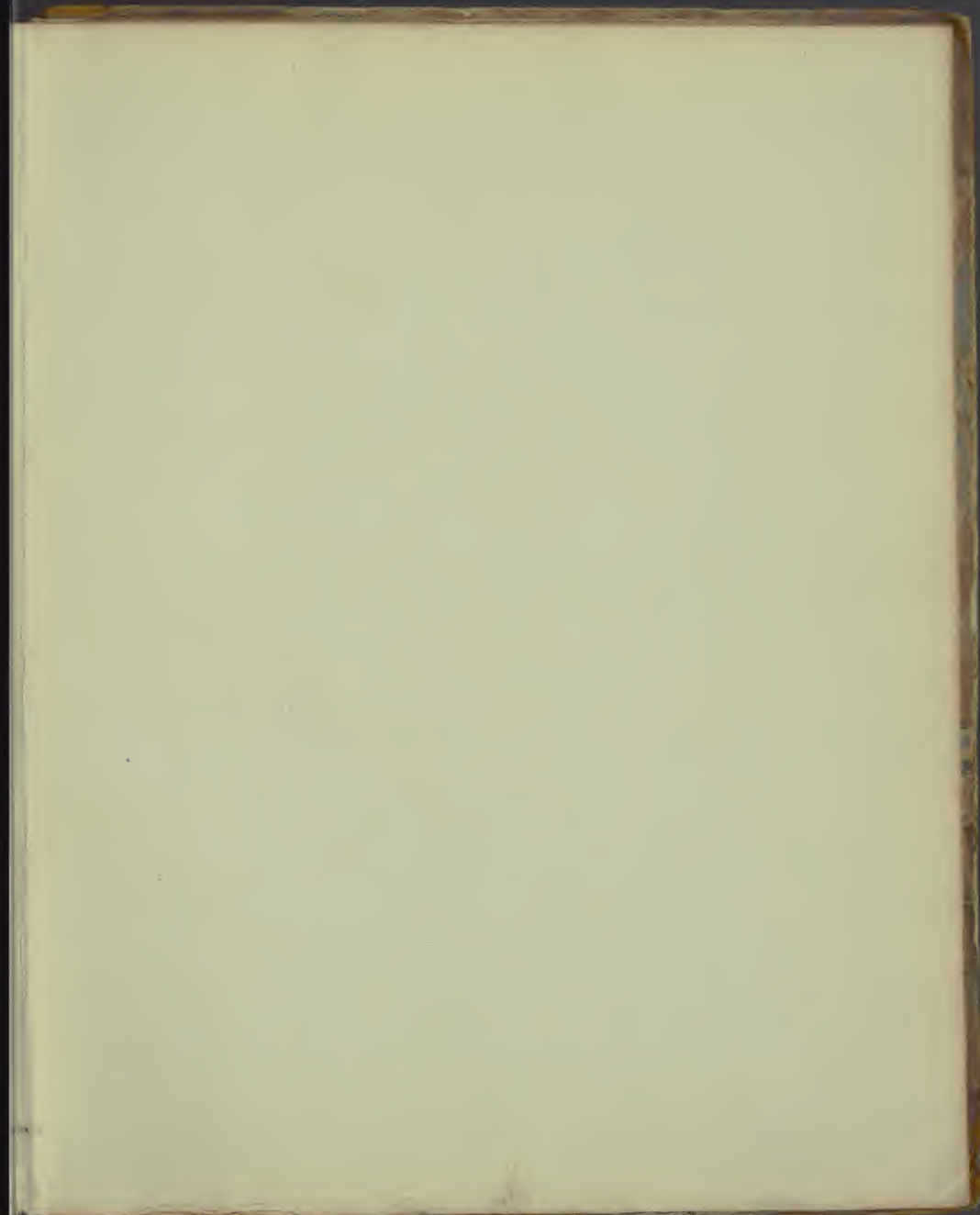


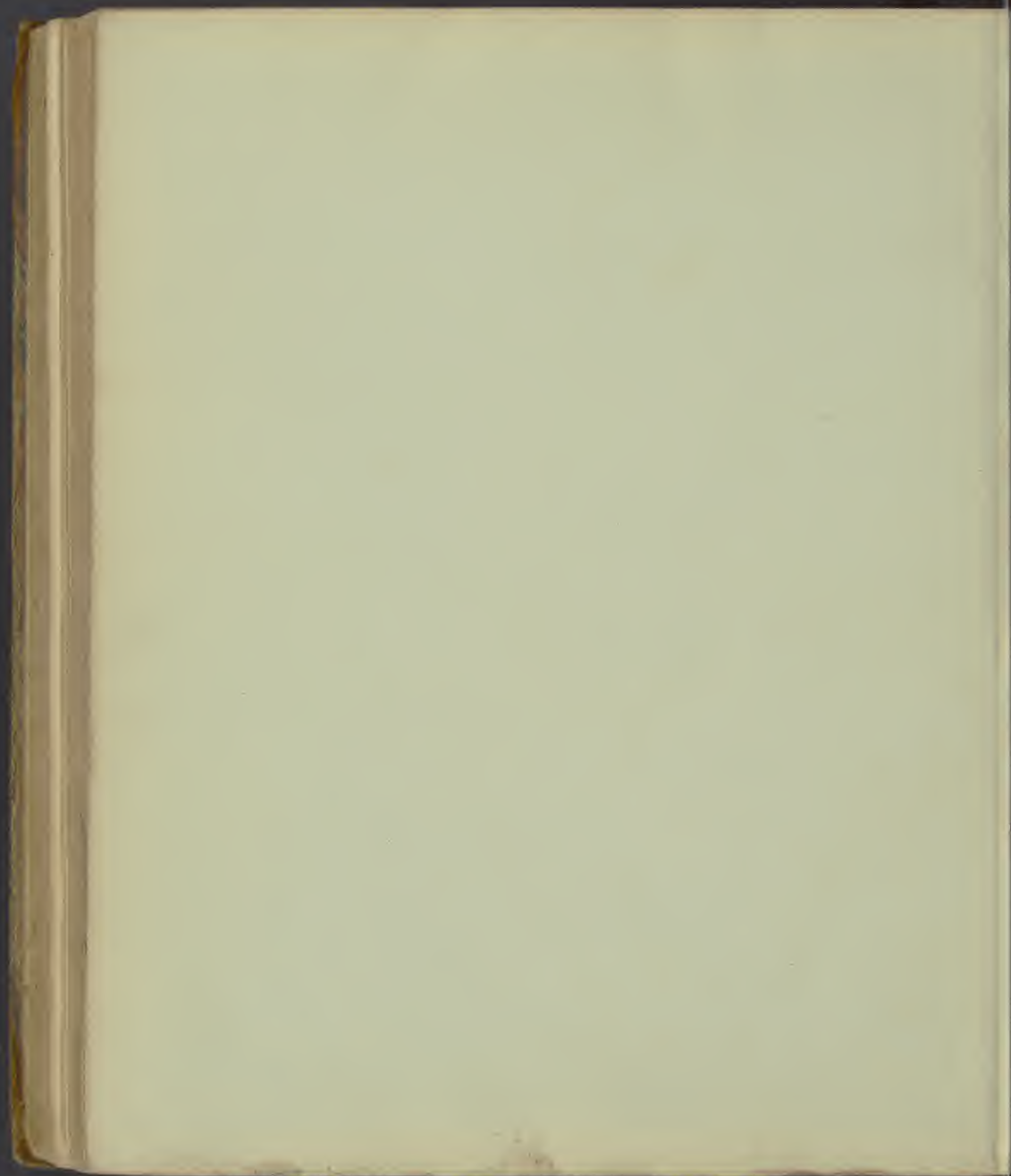


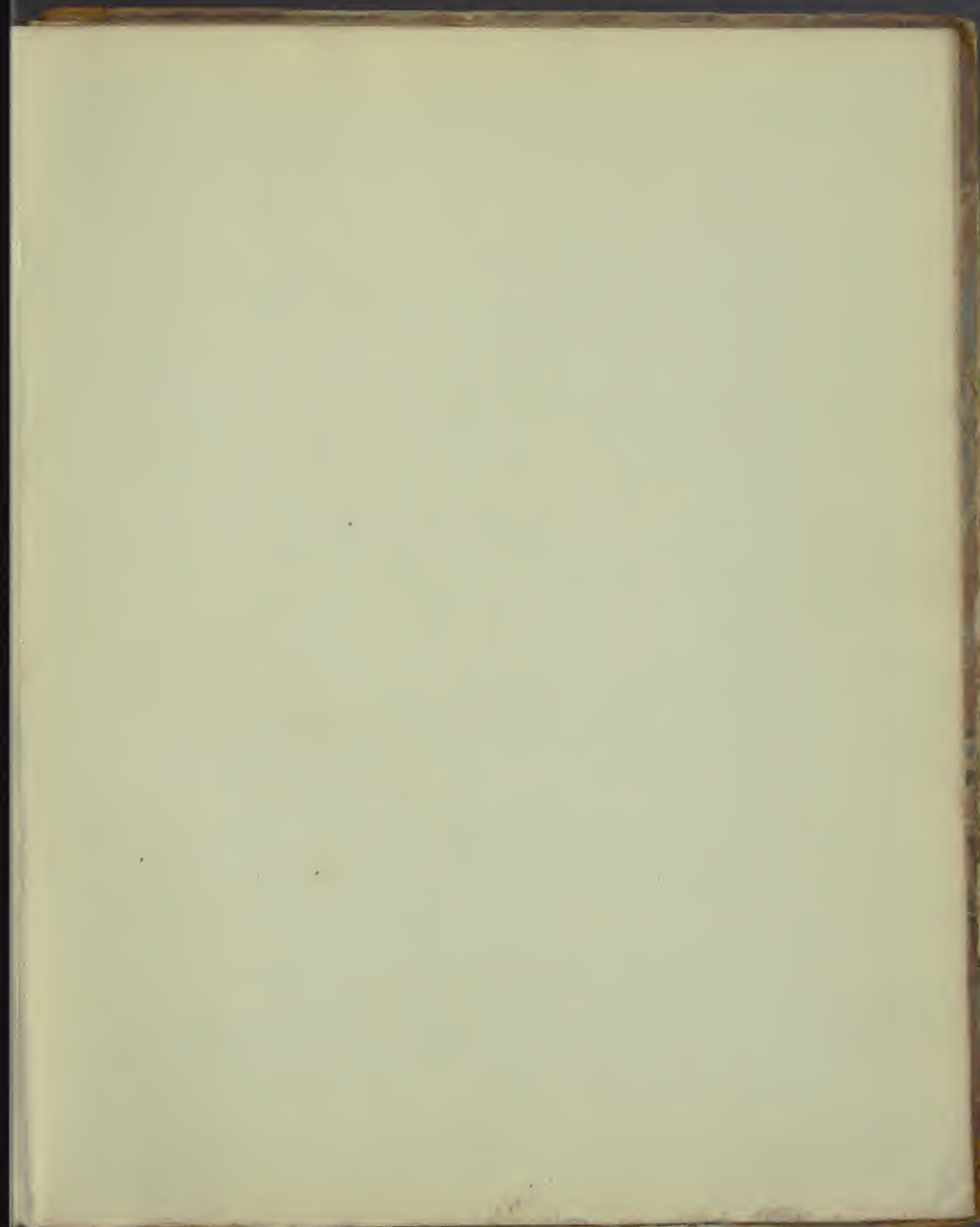


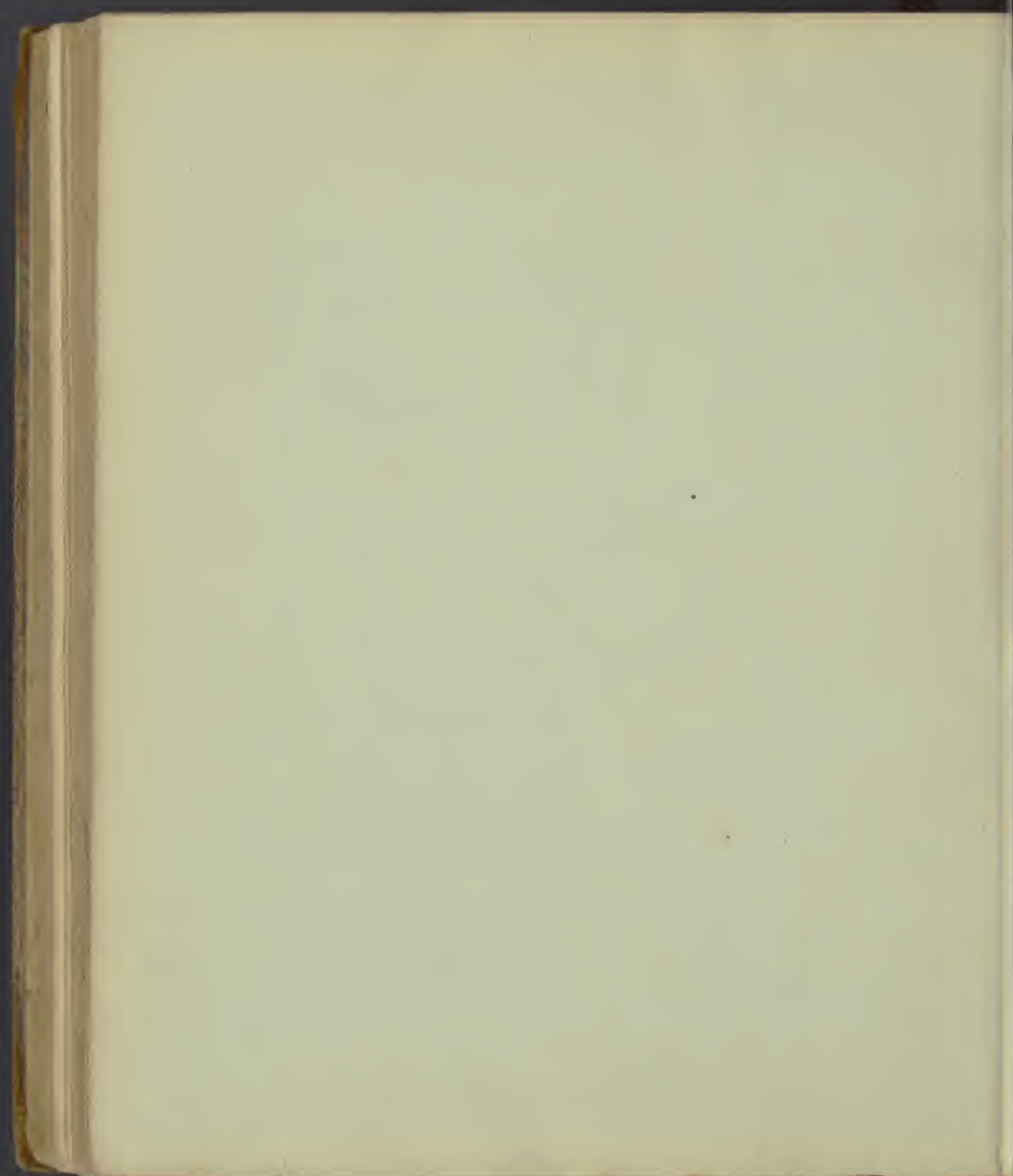


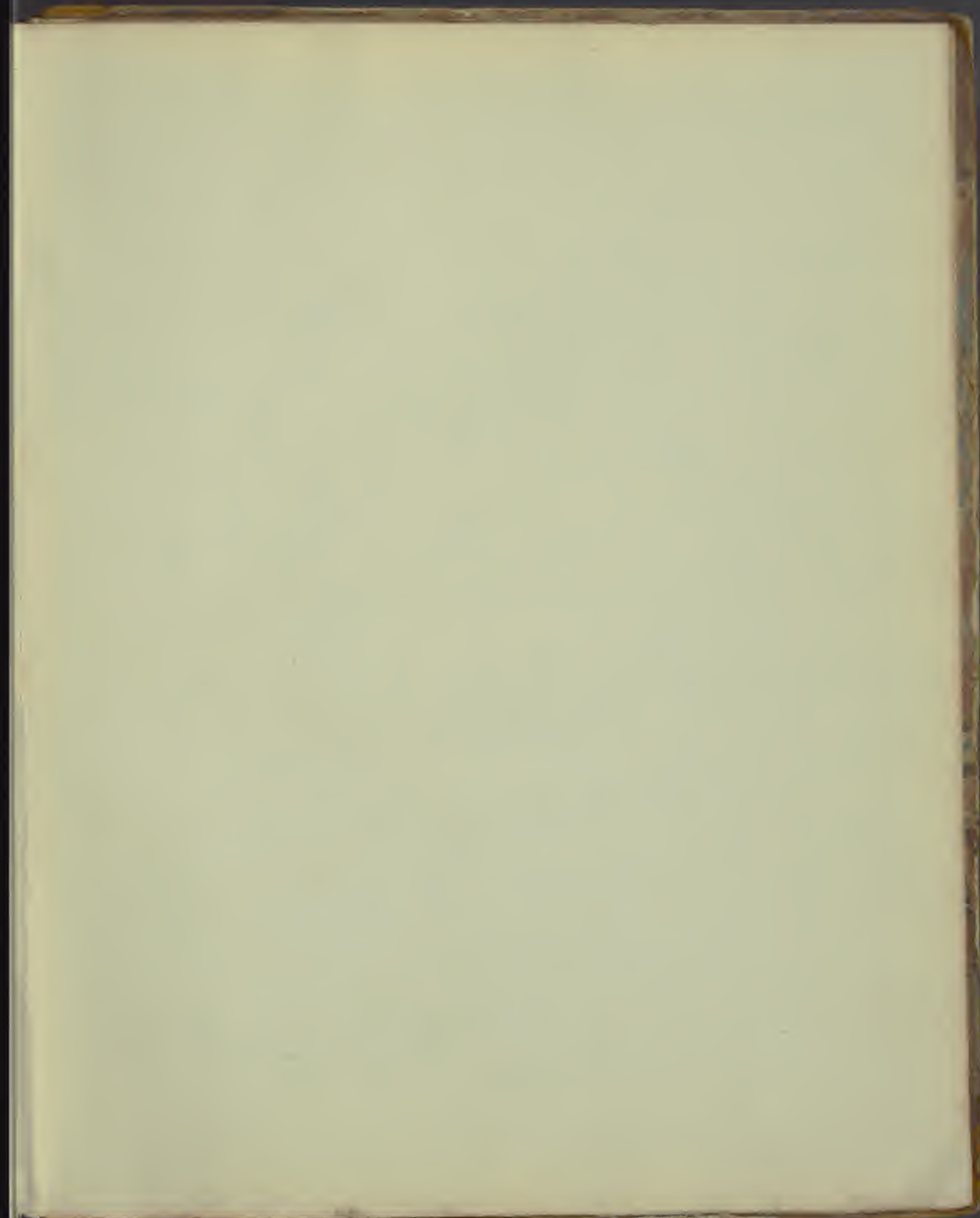


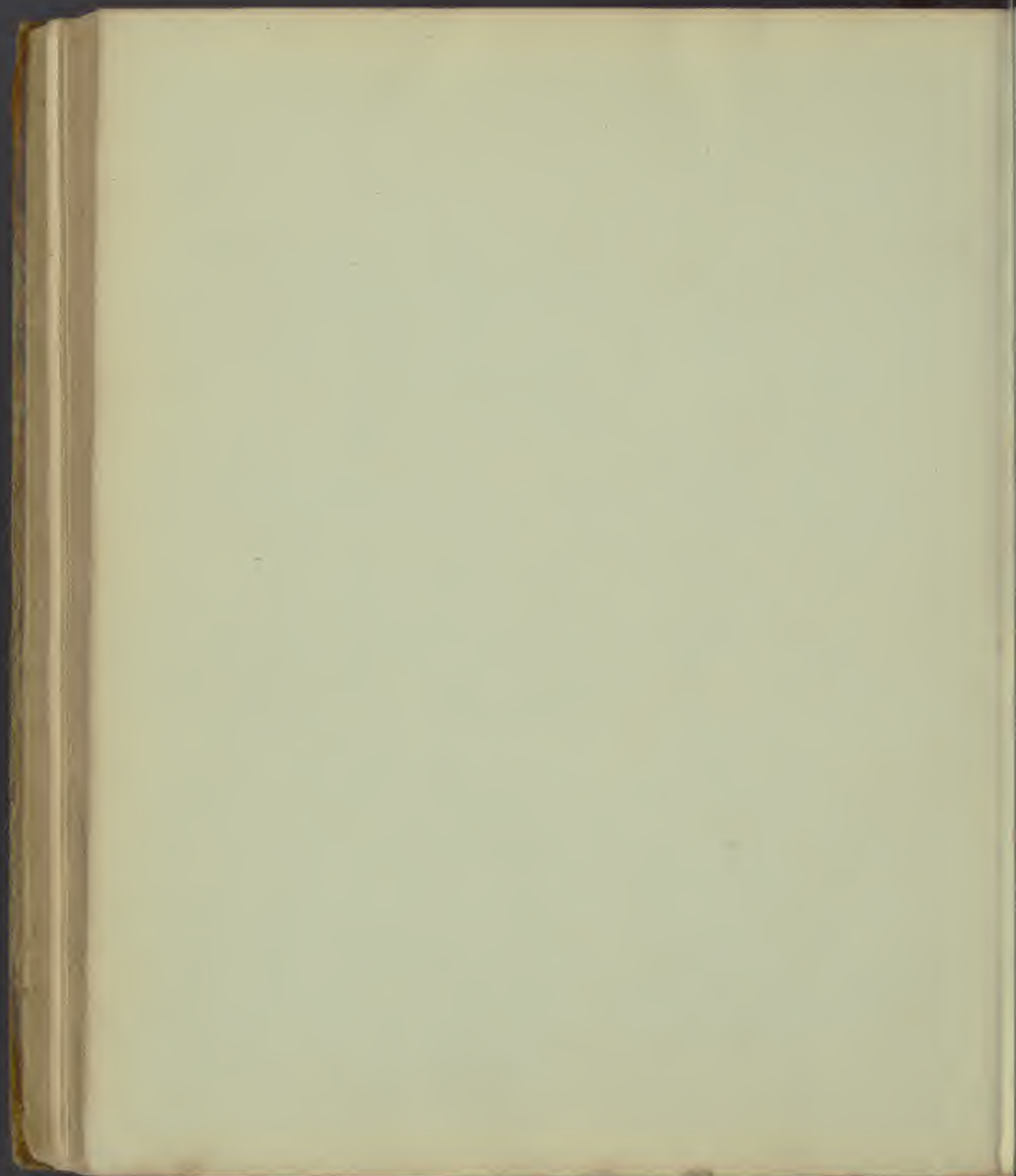


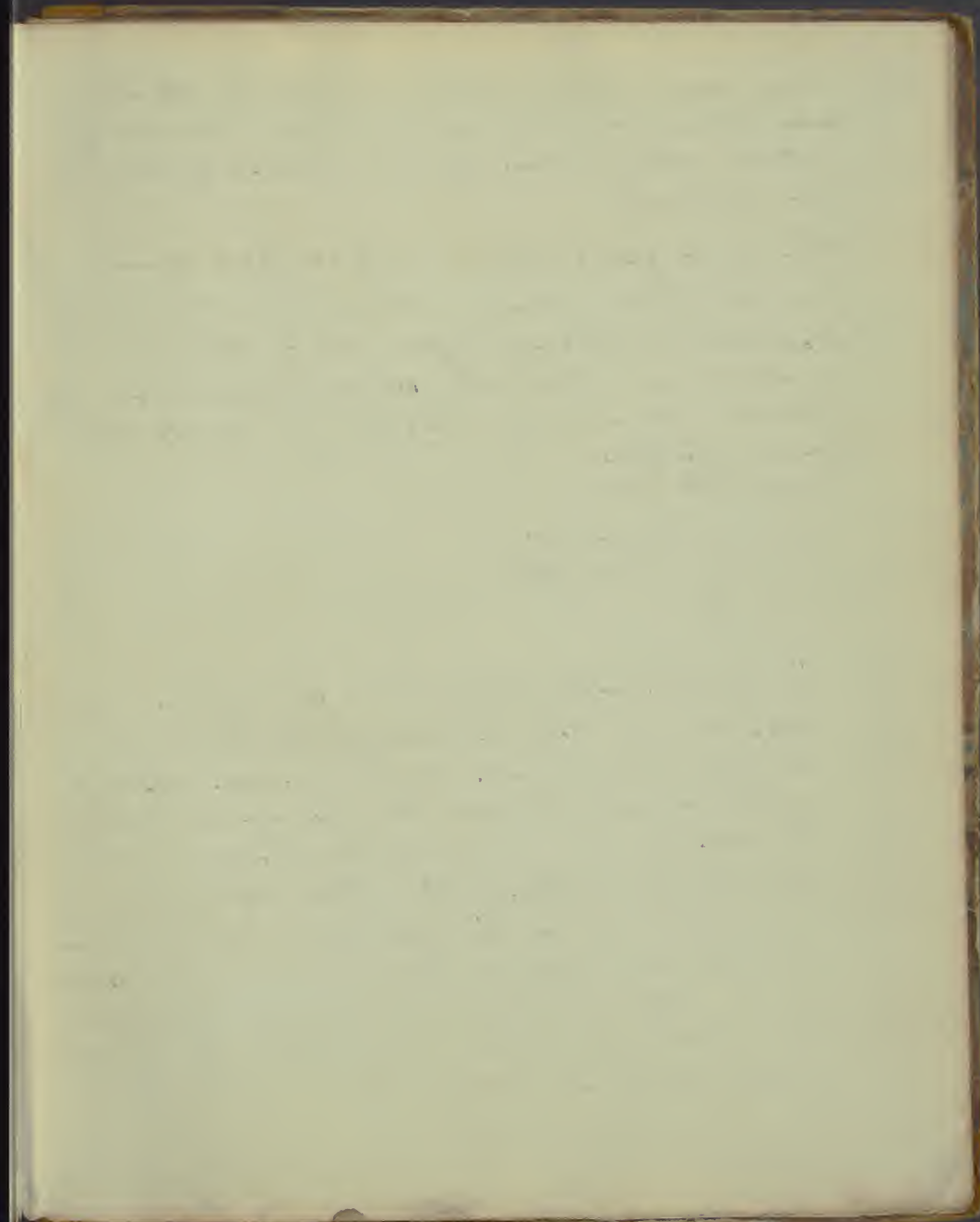












325. when general words of release stand alone they are taken literally & fully. but if they are preceded by particular specifications, they are restricted to them in their generality.

Thus if I give a release in full of all demands here the words release stand alone & have full & complete discharging effect: but if the words of release are preceded, by such. £1000 & £200 or £100 &c. the words of release refer only to the sums so specified.
Bacon, Ab. dead

Noted 7th 3rd dead 277.
Cruised 14th 3rd living 269.
O.C. 3/90.

If a grant is made to two persons & one dies, the other does not take his share of the grant. This may appear to conflict with the previous rule that if a grant is made to two or more persons, one of whom Perh. S. 192, 204 is legally unable to take. In *Comyn & D. Baron & Tenney* the whole estate passed by the grant seems to the other, but in the former rule the dead lives in its creation void as to one of the parties in the present rule it is voidable only, by the dissent of one of the parties who by their dissent relinquishes to take the

Questions

1. *what page 100.* }
2. - - 175 }
3. - - 49 }
4. - - 89 }

